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No. 3877

1317

1317

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

WILLIAM KLEIN, et al.,

Appellants,

vs.

CHARLES PETER, et al.,

Appellees.

Transcript of the Record

*Upon Appeals from the United States District Court
of the District of Idaho, Eastern Division.*

FILED

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WILLIAM KLEIN, et al.,

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CHARLES PETER, et al.,

Appellees.

Transcript of the Record

*Upon Appeals from the United States District Court
of the District of Idaho, Eastern Division.*

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INDEX

Assignments of Error.....	83
Bond on appeal.....	86
Citation	90
Clerk's certificate	95
Complaint	8
Exhibit "A" to complaint.....	61
Exhibit "B" to complaint.....	63
Exhibit "C" to complaint.....	71
Final decree	80
Minute entry	80
Motion to strike and dismiss complaint from files and docket of the Court.....	74
Motion to strike.....	77
Order allowing appeal.....	85
Petition for appeal.....	81
Praeipice for transcript.....	88

*In the District Court of the United States for the
District of Idaho, Eastern Division.*

William Klein, John Picha, Fred Kamp, William F. Kamp, Henry Kamp, Henry E. Hanstein, Albert E. Will, M. J. Dallmeyer, A. J. Dallmeyer, F. J. Tullius, Henry Walsh, Mattie McLennan, W. J. Weiche, and Weiche, his wife; John Hetzel, Frank Manning, Frank P. Zurline, Louie Thieme, Rudolph Schier, John W. Wolfe, Roy C. Wolf, Fanny M. Wolf, George H. Reding, William Graefe, Albert Coleman, J. H. Pruitt, Paul Brueschke, H. Eden, Mrs. Henry Schwarze, Henry C. Kamp and Margaret Kamp, his wife; Ernest Kamp, Elsie Kamp, W. A. Burtschi, W. J. Burtchi, David Scheihing, John Swirzinski, Mrs. W. Winstanley, T. F. Hansen, Anna Hansen, Mrs. A. Murray, G. W. Burmeister, Frank Vorphal, George Schwab, H. W. P. Wolf, Joel Sprunger, Martha Sprunger, Omer Sprunger, Elda Sprunger, Albert Sprunger, Irene Sprunger, A. G. Messall, Henry Knippelmeier, Peter Wolf, Nicholas Reding, William Sieber, Caroline Sieber, Albert Moeller, Joseph Vondran, H. H. Carter, C. Arnold, Theodore Von Elm, Michael Reding, E. C. Wolf, Henry C. Wolf, L. Eden, Mrs. A. H. Wolf, J. W. Pickard, John Bolton, Mrs. A. D. Frascoli, William Borchers, John Thiessen, F. Schaefermolte, August Bliefernich, William Berger, John Keller, Jack Keller, Fred Schielow, A. A. Knoch, C. Keller, A. C.

Boekle, E. R. Alpert, Frank H. Knoche,
 Frank H. Knoche, Fred Homrighausen,
 Paul Alpert, Arthur E. Ninman, H. E.
 Palmer, William Huesmann, Mrs. T. J.
 Rasp, J. W. Lorenzen, Frank Dale, J. C.
 Goggerty, Mrs. George Loeffelholz, Dan
 Schader, Jacob Rott, F. M. Mozer, John
 Hummel, Herman Meilke and H. Kap-
 pus, John Lorenzen, Robert G. Koerner,
 Elizabeth Kastner, G. L. Knoche, M. H.
 Seldelbach and William Fedderson,

Complainants,

vs.

Charles Peter, J. M. Stevens, A. J.
 Weber, Arthur H. Freber, W. R. Cal-
 vert, Frank Van der Linde, William
 Jacobsen, R. E. Roser, Ferdinand Wal-
 ther and the Mascot Mining & Milling
 Company, Ltd., of Idaho,

Defendants.

No. 307.

COMPLAINT IN EQUITY.

Comes now the above named complainants and for their cause of action herein, allege and state:

(1) That this is a suit in equity of a civil nature arising wholly between citizens of different states, and that the matter in controversy in this action exceeds, exclusive of interest and costs, the sum and value of three thousand (\$3,000.00) Dollars.

(2) That the complainants herein, to-wit: William Klein, John Picha, Fred Kamp, William F. Kamp, Henry Kamp, Henry E. Hanstein,

Albert E. Will, M. J. Dallmeyer, A. J. Dallmeyer, T. J. Tulus, Henry Walsh, Mattie McLennan, W. J. Weiche and Weiche, his wife; John Hetzel, Frank Manning, Frank P. Zurline, Louie Thieme, John W. Wolf, Roy C. Wolf, Fanny M. Wolf, George H. Reding, Albert Coleman, J. H. Pruitt, H. Eden, Mrs. Henry Schwartz, W. A. Burtchi, W. J. Burtchi, David Scheihing, John Swirzinski, Mrs. W. Winstanley, T. F. Hansen, Anna Hansen, Mrs. A. Murray, G. W. Burmeister, George Schwab, H. W. P. Wolf, A. G. Messall, Henry Knippelmeier, Peter Wolf, Nicholas Reding, William Sieber, Caroline Sieber, Albert Moeller, Joseph Vondran, H. H. Carter, C. Arnold, Theodore Von Elm, Michael Reding, E. C. Wolf, Henry C. Wolf, L. Eden, Mrs. A. H. Wolf, J. W. Pickard, John Bolton, Mrs. A. D. Frascoli, William Borchers, John Lorenzen, Robert G. Koerner, Elizabeth Kastner, John Thiessen, M. H. Seldeback, William Fedderson, Arthur E. Ninmann, H. E. Palmer, William Huesmann, Mrs. T. J. Rasp, J. W. Lorenzen, Frank Dale, J. C. Goggerty, Mrs. George Loeffelholz, Dan Schader, F. M. Mozer, John Hummel and H. Kappus, are and for a long time past have been citizens, residents and inhabitants of the State of Oklahoma.

(3) That the complainants herein, to-wit: Rudolph Schier, is and for a long time past has been a citizen, resident and inhabitant of the State of Arkansas.

(4) That the complainants herein ,to-wit: William Graefe, is and for a long time past has been a citizen, resident and inhabitant of the State of Colorado.

(5) That the complainants herein, to-wit: Paul Brueschke, Henry C. Kamp and Margaret Kamp, his wife, Ernest Kamp, Elsie Kamp, August Bliefferich, William Berger, John Keller, Jack Keller, C. Keller, Fred Schielow and Jacob Rott are and for a long time past have been residents, citizens and inhabitants of the State of Missouri.

(6) That the complainant, A. A. Knoch, is and for a long time past has been a citizen, resident and inhabitant of the State of Ohio.

(7) That the complainant herein, Frank Vorphal, is and for a long time past has been a citizen, resident and inhabitant of the State of Wyoming.

(8) That the complainants herein, to-wit: Omer Sprunger, Joel Sprunger, Martha Sprunger, Elda Sprunger, Albert Sprunger and Irene Sprunger are and for a long time past have been citizens, residents and inhabitants of the State of Oregon.

(9) That the complainants herein, to-wit: F. Schaefermolte, A. C. Boehle, E. R. Alpert, Frank H. Knoche, J. W. Knoche, Fred Homrighausen, Paul Alpert, G. L. Knoche and Herman Mielke, are and for a long time past have been citizens, residents and inhabitants of the State of Kansas.

(10) That the defendant, the Mascott Mining & Milling Company, Ltd., of Idaho, is a corpora-

tion duly organized and existing under and by virtue of the laws of Idaho, with a pretended place of business at Pocatello in said state, but at all times mentioned in this supplemental and amended complaint has maintained and conducted its principal place of business at Salt Lake City, Utah, as is hereinafter alleged and set forth in this supplemental and amended complaint.

(11) That the defendant herein, Charles Peter, is and has been at all times herein mentioned, a citizen, resident and inhabitant of the State of Utah.

(12) That the defendants herein, A. J. Weber and Arthur H. Freber are and for a long time past have been citizens, residents and inhabitants of the State of Utah.

(13) That the defendant herein, W. R. Calvert, is and for a long time past has been a citizen, resident and inhabitant of the State of Utah.

(13a) That the defendant herein, Frank Van der Linde, is and for a long time has been a citizen, resident and inhabitant of the State of Utah.

(13b) That the defendant herein, William Jacobsen, is and for a long time past has been a citizen, resident and inhabitant of the State of Utah.

(13c) That the defendant herein, R. E. Roser, is and for a long time has been a citizen, resident and inhabitant of the State of Idaho.

(14) That the defendant herein, Ferdinand Walther, is and for a long time past has been a

citizen, resident and inhabitant of the State of Illinois.

(15) That the defendant herein, J. M. Stevens, is and for a long time past has been a citizen, resident and inhabitant of the State of Idaho.

(16) That on or about the 4th day of September, A. D. 1915, and thereafter for a period of time extending until the filing in this Court of this supplemental and amended complaint in equity, the defendants herein named, to-wit: Charles Peter, J. M. Stevens, A. J. Weber, Arthur H. Freber, W. R. Calvert, Frank Van der Linde, William Jacobsen, R. E. Roser and Ferdinand Walther did then and there, to-wit: on or about the 4th day of September, 1915, and thereafter during the entire period of time extending to the date of the filing of this supplemental and amended complaint, with the intent to wrong, cheat and defraud each and all of the complainants herein named and the public generally, all of whom are hereinafter called and designated "the victims", unlawfully, wrongfully, fraudulently and feloniously confederate, conspire and agree by and among themselves and each of them to the effect that said defendant and each and all of them would and should and did then and there plan, formulate and devise a certain scheme to defraud the complainants herein and the public generally, the nature, tenor, purpose, effect and character of which was and is as follows, to-wit:

That the said Charles Peter would and should obtain and procure certain mining claims and properties in the State of Idaho, or elsewhere, of little or no value, and that thereafter he would and should incorporate or cause to be incorporated a corporation to be known as the Mascot Mining & Milling Company of Utah, with an authorized capital stock of \$600,000.00; and that thereafter he would or should convey and transfer unto the said Utah Corporation, the said mining claims and properties as aforesaid, at and for a valuation of approximately \$300,000.00; and that he and said conspiring defendants would and should receive therefor the capital stock of said Utah corporation in the amount of approximately 300,000 shares, for all of which shares the said conspiring defendants would and should pay nothing of value to said Utah corporation, in this, to-wit: that at said time the said Charles Peter would and should procure said mining claims and properties in Idaho as aforesaid, of little or no value, with the money of other persons, and that in the procuring and obtaining of said claims and properties the said Charles Peter would and should obtain and procure the money with which to purchase the same by fraud and deceit, and by false representations to other persons, as hereinafter set forth, by then and there representing and pretending that the said property and claims would and should cost and be of the value of \$53,000.00, when in truth and in fact, the said de-

fendant, Charles Peter, would and should obtain and procure the same for the sum of \$2,000.00, or less.

And that thereupon, in the creation and organization of the Mascot Mining & Milling Company of Utah, the said defendant, Charles Peter, would and should associate with him, in the incorporation thereof and in the management and the Board of Directors thereof, certain persons, to-wit: M. Barnett, Frank Moormeister, Paul Vantinke and Robert Reich, all of whom would and should be associated with the said Charles Peter, with the intent and for the purpose of misleading and deceiving the said victims into believing that the care and management of the said Utah corporation was in the hands of competent and honest officers and directors, when in truth and in fact, the entire management and control of the affairs of said Utah corporation would and should be vested in the said Charles Peter, for the purpose of cheating and defrauding said victims; and the said associates of the said Charles Peter would and should only be nominal officers and directors with no real duties or responsibilities, their names being used by the said Charles Peter as part of the defendants' scheme to cheat and defraud said victims.

And that thereafter the said Charles Peter, having the confidence of his said associates as aforesaid, would and should be designated and elected and installed as the president and general manager

of said Mascot Mining & Milling Company of Utah; and that thereupon the said Charles Peter and his co-conspirators would and should by letters and newspapers, and printed pamphlets, publications and circulars to be sent and delivered through the United States mails, and by verbal representations and statements of themselves and their agents, falsely and fraudulently pretend, represent and state to the victims herein that the said mining claims and properties in Idaho, of little or no value as aforesaid, were of great value as mining property; and as aforesaid would and should represent and state that by reason of the said Utah corporation being the owner of said claims and property, that the capital stock of said corporation also was a great value and was a valuable investment, and would and should pay large dividends to the public generally purchasing the same, and that the money and funds derived from the sale of the capital stock of said Utah corporation would and should be used to make and develop a mine upon the said property of said Utah corporation and to thereafter equip and operate the same in good faith for the use and benefit of the shareholders of said Utah corporation generally; and that the said Charles Peter and his co-conspirators would and should as aforesaid, through the United States mails and by and through themselves personally, and by and through certain agents, sell shares of the capital stock of said Utah corporation to said

victims and the public generally; and that thereafter said Charles Peter and his co-conspirators would and should, in the maner aforesaid, falsely and fraudulently represent and state to the victims who had purchased shares of stock in said Utah corporation and its shareholders to increase the capital stock of the said Utah corporation to \$1,000,000 by the organization of a new and separate corporation with and authorized capital stock of \$1,000,000 to be named the Mascot Mining & Milling Co., Ltd., of Idaho, and that in the organization of said Idaho corporation the said Charles Peter would and should associate with him as incorporators, officers, and members of the Board of Directors, certain persons, to-wit: John W. Choate, M. L. Sternberh and the defendant herein J. M. Stevens, all of whom would and should be associated with the said Charles Peter with the intent and for the purpose of misleading and deceiving the said victims into believing that the care and management of the Idaho corporation was in the hands of competent and honest officers and directors, when in truth and in fact the entire management and control of the affairs of said Idaho corporation would and should be vested in the said Charles Peter and his co-conspirators for the purpose of cheating and defrauding said victims; and the said associates of said Charles Peter would and should only be nominal officers and directors with no real duties or responsibilities, their names being

used by the said Charles Peter as part of the said defendants' scheme to cheat and defraud said victims. And that thereupon the said Charles Peter, having the confidence of his said associates as aforesaid, would and should be designated, elected and installed as the president and general manager of said Idaho corporation; and that thereupon the said mining claims and properties of the said Utah corporation would and should be conveyed and transferred to the said Idaho corporation at a fictitious and fraudulent valuation of \$650,000.00, payable in stock of the Idaho corporation to the stockholders of the Utah corporation; and that thereupon the said Charles Peter and his co-conspirators would and should by letter, newspapers, printed pamphlets, publications, and circulars to be sent and delivered through the United States mails and by verbal representations and statements of themselves and their agents, falsely and fraudulently pretend, represent and state to the victims herein that the mining claims and properties owned by the said Idaho corporation and formerly owned by the said Utah corporation as aforesaid, were of great value as mining properties; and as aforesaid would and should represent and state that by reason of the said Idaho corporation being the owner of said claims and properties, that the capital stock of said corporation also was of great value and a valuable investment, and would pay large dividends to the victims and the public generally purchasing

the same, and that the money and funds derived from the sale of the capital stock of said Idaho corporation would and should be used to make and develop a mine upon the said properties of said Idaho corporation, and thereafter to equip and operate the same for the use and benefit of the shareholders of the said Idaho corporation generally and that the said Charles Peter and his co-conspirators would and should as aforesaid, through the United States mails, and through themselves personally and through agents, sell shares of the capital stock of the said Idaho corporation to the said victims and to the public generally.

That the said Charles Peter and his co-conspirators upon the organization and incorporation of the said Idaho corporation, would and should falsely and fraudulently, and without consideration, issue or cause to be issued to themselves in their names and in the names of other persons for the benefit of said conspiring defendants, large amounts of the capital stock of the said Idaho corporation, being approximately in the sum and amount of 500,000 shares or more, for which the said Charles Peter and said co-conspirators would and should neither pay nor give anything of value to the said Idaho corporation.

That the said defendant, Charles Peter, and his co-conspirators would and should unlawfully, wrongfully and fraudulently issue or cause to be issued to themselves without consideration, suffi-

cient amounts of the capital stock of the said Utah corporation to the said Idaho corporation, for the purpose and in order that he, the said Charles Peter and his said co-conspirators would and should at all times have issued and outstanding in their names, for their individual use and benefit a sufficient amount of the capital stock of said corporation to promote and execute said scheme to defraud, and for the purpose, and in order that the said defendant, Charles Peter, and his co-conspirators, at all time would and should have a control and sufficient amount of the capital stock of said corporations to retain the control and management of the affairs of said corporations, and the selection of its Board of Directors in order to further carry out said fraudulent scheme to defraud from time to time; and for all of said capital stock of said corporations pay nor give anything of value to the said corporations.

And that all of the capital stock of the said corporations sold or caused to be sold by the said Charles Peter and his co-conspirators as hereinafter set forth, to the victims, would and should at all times be worthless and without value and would and should not participate in profits or dividends of said corporations, even in the event that the said mining claims and properties aforesaid should prove to be of great value.

And that he, the said Charles Peter, and his co-conspirators during the existence of said fraudu-

lent scheme to defraud, would and should for the purpose of carrying the same further into effect, create and organize, separate and distinct mining company or companies of which the said Charles Peter and his con-conspirators would and should control and be the owners of the capital stock of such company or companies, and would and should be the chief and principal owners of such stock, and which said separate mining company or companies so owned and controlled by the said consiprators, would and should sell and transfer unto the said Utah corporation, and unto the said Idaho corporation, certain alleged mining claims or properties of little or no value and receive therefor large sums of money from the said Utah corporation and from the said Idaho corporation, and that thereby the money and funds of the victims herein received from the sale of the capital stock of said Utah and Idaho companies would and should unlawfully, wrongfully and fraudulently obtained and converted by the said conspiring defendants, and the said Utah and Idaho corporations receive nothing of value therefor.

(17) That the said defendants' scheme to defraud as set forth in paragraph 16 hereof, was and is false and fraudulent and untrue, and at all times known to the said defendant to be false and fraudulent and untrue, in this, to-wit:

That the mining claims and properties to the said Idaho corporation, formerly owned by the said

Utah corporation, were not of great value as mining property, but in truth and in fact were of little or no value; and that the capital stock of the said Utah corporation and the capital stock of the said Idaho corporation were not of great value, nor did the same constitute a valuable investment, but in truth and in fact was at all time without value and worthless; and that such stock would and should at all times be worthless and without value as to said victims; and that neither the said Utah corporation nor the said Idaho corporation would under any circumstances pay dividends to the victims and the public generally purchasing its capital stock; and that the money and funds derived from the sale of the capital stock of the said Utah corporation, and the capital stock of the said Idaho corporation would not and should not be used to make and develop a mine upon said mining claims and properties, nor would the same be used to equip and operate a mine for the use and benefit of the shareholders of said corporations; and that it was not to the best interests of the shareholders of the said Utah corporation to increase its capital stock by the organization of the Idaho corporation and the transfer of its mining claims and properties to said Idaho corporation, and that instead of intending to in good faith organize and promote and build a mining company to engage in a general mining business, as represented to the victims herein, the said defendants at all times mentioned here-

in intended to unlawfully, wrongfully and fraudulently cheat and defraud the said victims by selling to the said victims their individual shares of the capital stock of said corporations and also the individual shares of stock of others upon which they would and should obtain options at low prices and thereafter sell to the victims herein at high prices, and to thereafter retain and keep and convert the money and funds derived from the sale of all said shares of stock to their individual use and benefit.

And that the said defendants intended that at all times they would and should only use and expend upon the said mining claims and property, sufficient amount of money for development to make a showing, and a false and fraudulent pretense to the victims herein that the said companies, through their management were in good faith trying to develop and mine said property. And that at all times herein the said defendants intended that only a very small portion of the capital stock of said companies would and should be sold from the treasury stock, and that the proceeds and money obtained from the stock sold, whether the individual stock of the said defendants or others, or from the treasury stock of the companies, would and should be obtained, received and used by the said defendants individually, and by them converted to their own use and benefit, except such small sums and amounts as were by the said defendants deemed advisable to be expended upon the mining claims and

property aforesaid to deceive the victims, and further promote the said defendants' scheme to defraud as aforesaid.

And that said defendants at all times intended that if at any time during the existence and execution of their said scheme to defraud it would or should be determined or discovered that the said mining claims and properties of the said Idaho corporation, formerly owned by the said Utah corporation, were of sufficient richness in ore and minerals to prove of sufficient value to make a mine upon which to build and maintain a mining company in good faith, that then in such event the rights and interests of the said victims, as evidenced and represented by their said shares of the capital stock of said corporations, would and should be cancelled and destroyed and their shares of stock rendered worthless and valueless by reason of unlawful, wrongful and fraudulent claims which should be made by the said Charles Peter and his co-defendants against said Utah and Idaho corporations for alleged sums of money which the said Charles Peter and his co-defendants would and should wrongfully, unlawfully and fraudulently claim to be due to them from said corporations; and by reason of mortgage liens to secure the same and the foreclosure thereof which the said Charles Peter and his co-defendants would and should wrongfully, unlawfully and fraudulently obtain upon said mining claims and property; and by reason of unlawful,

wrongful and fraudulent assessments which the said Charles Peters and his co-defendants would and should make or cause to be made upon the shares of the capital stock of said corporation held by the victims herein; and by reason of unlawful, wrong and fraudulent suits for receiverships which would and should be brought and instituted for the individual use and benefit of the said defendants in aid of their said fraudulent scheme to defraud, and to deprive the victims herein of their rights, titles and interests in and to said properties.

(18) That pursuant to the said defendants' scheme to defraud as aforesaid, and in order to affect the purposes thereof and execute the same, the said Charles Peter did, together with other persons, to-wit: M. Barnett, F. Moormeister, Paul Van Tinke and Robert Reich, create, organize and incorporate, by making, acknowledging and filing in the office of the Secretary of State of Utah on the 4th day of September, 1915, Articles of Incorporation, whereby the Mascott Mining & Milling Company of Utah was duly incorporated with a capital stock of \$600,000.00, divided into 600,000 shares of the par value of \$1.00 each; and that thereupon the said Charles Peter, having the confidence of his said associates as aforesaid, was designated, elected and installed as the president and general manager of the said Utah corporation.

And that thereafter, he, the said Charles Peter, sold and transferred to the said Utah corporation,

four patented mining claims of little or no value, names as follows, to-wit: Oregonian, Silver Fortune, Snow Clad, and the P. K., located and situated in Blaine County, Idaho; for which he issued or caused to be issued to himself, 300,000 shares of the capital stock of said Utah corporation, and from which he transferred or caused to be transferred to his said associates approximately one thousand shares each.

(19) That the issuance of the said 300,000 shares of the capital stock of the said Utah corporation to the defendant herein, Charles Peter, was and at all times has been false, fraudulent, wrongful and invalid in that the said Charles Peter did not then and there, or at any time pay, give, or transfer to the said corporation anything of value therefor; and that the said 300,000 shares of the said capital stock was so issued or caused to be issued by the said Charles Peter to himself for and without consideration therefor, and that said stock was so issued to said Charles Peter for said conspirator's benefit in that execution of their said scheme to defraud.

(20) That at the time the said Charles Peter transferred and conveyed the said mining claims to said Utah corporation they were of little or no value, having been purchased and acquired by him, the said Charles Peter, with the money, in the sum of \$2,000.00 wrongfully and fraudulently obtained by the said Charles Peter by fraud and deceit from

his associate Frank Moormeister, upon the representation by the said Charles Peter to the said Frank Moormeister that said claims were of the value and would cost the sum of Fifty-three thousand (\$53,000.00) Dollars; all of which representation was then and there false and fraudulent and untrue in that the said Charles Peter had then and there procured the said mining claims, for the sum of only \$2,000.00.

(21) That upon the organization and incorporation of the said Utah company, the said conspiring defendants wrote, sent, authorized and caused to be written, printed and sent letters, newspapers, printed pamphlets, publications and circulars, by and through the United States mails, by reason of which, and also by verbal representations and statements of themselves and certain agents, the names of whom the complainants are at this time unable to state, falsely and fraudulently pretended, represented and stated to the victims herein, that the said mining claims and properties in Idaho were of great value as mining property, and that by reason of the said Utah corporation being the owner thereof that the capital stock of said corporation also was of great value, and was a valuable investment and would pay large dividends to the victims and the public generally purchasing the same, and that the money and funds derived from the sale of the capital stock of said Utah corporation would and should be used to make and develop a

mine upon the said property of said Utah corporation and to thereafter equip and operate the same in good faith for the use and benefit of the shareholders for the said Utah corporation generally, and that your complainants herein, and all the victims herein, relied upon and believed to be true, the representations and statements made and caused to be made by said defendants, personally, and by and through certain agents, and by and through certain written and printed letters, newspapers, pamphlets, publications and circulars, sent and delivered through the United States mails, and all of which representations and statements, being then and there false, fraudulent and untrue, and the same being heretofore set forth in detail in paragraph 21 hereof, and so relying and believing, did heretofore upon certain dates which your complainants are at this time unable to state, purchase from the said Charles Peter and his co-conspirators approximately 6500 shares of the capital stock of the Utah corporation, and for which they paid said conspirators the sum of approximately \$6500.00 in cash, all of which said conspiring defendants then and there converted to their own use and benefit.

(22) That between the 4th day of September, 1915, and the 5th day of March, 1916, the said defendants issued or caused to be issued 430,600 shares of the capital stock of said Utah corporation, including the original issue to Charles Peter of said 300,000 shares, and all of which were by

the said conspirators, intentionally, wrongfully and fraudulently issued or caused to be issued without consideration to themselves and others for the purpose of further executing their said scheme to defraud by selling the same to the complainants and victims herein, and the public generally, not for the use and benefit of the said defendant corporation, but for the individual use and benefit of said conspirators and for the use and benefit of said conspirators in allowing and permitting them to have and control a sufficient amount of the capital stock of the said corporation to keep them in the control and management thereof.

(23) That the complainants herein are at this time unable to state the exact sums or amounts of money which the said defendant, Charles Peter and his co-defendants procured and obtained from the victims herein, and wrongfully and fraudulently converted to their own use and benefit, but in relation thereto, according to their best knowledge, information and belief, they allege the fact to be that from the sales of all of said capital stock of said Utah corporation as aforesaid, the said Charles Peter and his co-conspirators wrongfully, unlawfully and fraudulently received and converted to their own use and benefit the sum of \$21,000.00, or more, and the said Utah corporation and the victims herein received nothing.

(24) Your complainants further allege and state that between the 4th day of September, 1915,

and the 6th day of March, 1916, the said defendant, Charles Peter, was under and by virtue of the terms of the said defendants conspiracy and scheme to defraud, the general manager and president of the affairs of said Utah corporation, including the sale of its capital stock and the receipts and disbursements of the money and funds derived therefrom, and that the said defendant, Charles Peter, as such President and General Manager, and with the aid, consent, connivance and knowledge of his co-conspirators, and in order to effect the common design and purpose of said conspiracy and scheme to defraud, did wrongfully, unlawfully and fraudulently neglect and fail to manage and conduct the affairs of the said Utah corporation on behalf and in the interest of its shareholders and victims herein, but on the other hand did at all times intentionally, knowingly, unlawfully, wrongfully and fraudulently conduct the affairs of the said Utah corporation for his own individual use and benefit and private gain and for the individual use and benefit and private gain of his said co-conspirators.

(25) That from the time of the organization and incorporation of the said Utah company, on or about the 4th day of September, 1915, up until the creation, organization, and incorporation of the Idaho company on or about March 6th, 1916, the said defendant herein, Charles Peter, and his said co-conspirators then and there at all times having the entire control and management of the said Utah

company; wholly and entirely, wrongfully, unlawfully and fraudulently failed and refused to properly and competently mine or develop the mining claims and property then owned, as aforesaid by said Utah company; but, on the other hand, only caused such work to be done or pretended mining activity to be shown as was by them deemed necessary and advisable to deceive the complainants and victims herein, in order that the said scheme to defraud would not be by them discovered, and to aid them in the further execution of this scheme to defraud; and that during all of said time no ore was mined or milled or sold by the said Utah corporation and no profits or gain made by it, and that during all of said time the said defendant, Charles Peter, and his co-conspirators, in order to effect the common design of said conspirators and to aid in the execution of said scheme to defraud, wholly and entirely, wrongfully, unlawfully and fraudulently refused and neglected in any manner to use the money and funds derived from the sale of its stock or any part thereof toward the development and making of a mine upon its said mining claims and property, and that under the said management and control of said Utah corporation by the said Charles Peter, and his co-conspirators on or about March 6, 1916, the said Utah corporation had outstanding or issued, capital stock to the extent and amount of 430,600 shares, and had no money or funds in the treasury, was wholly and entirely and hopelessly

insolvent and unable to conduct business with its said properties wholly and entirely undeveloped; and at that time had standing against it upon its books an alleged, false and untrue and fraudulent indebtedness in the sum of \$21,724.25, which indebtedness was then and there incorrect, unjust and fraudulent, and then and there claimed by the defendant herein, the said Charles Peter, as a valid indebtedness against said Utah corporation for and on account of money claimed and alleged by the said defendant, Charles Peter, to have been loaned in good faith by him individually to said Utah corporation, when in truth and in fact said alleged indebtedness was, as aforesaid, fictitious, untrue, false and fraudulent, and created and claimed by the said defendant, Charles Peter, as part of and in aid of said scheme to defraud.

(26) That thereafter, on or about the 6th day of March, 1916, the said defendant herein, Charles Peter and his co-defendants wrongfully, unlawfully and fraudulently represented and stated to the complainants and victims, and shareholders of the said Utah company that it was to their best interests and to the best interests of the said Utah company that its capital stock be increased to \$1,000,000.00 by the organization of a new and separate corporation under the laws of the State of Idaho, and that the said Charles Peter and his co-defendants then and there having the confidence of said shareholders, complainants and victims, did

thereupon cause to be created, organized and incorporated corporation known and described as the Mascot Mining & Milling Company, Ltd., of Idaho, with an authorized capital stock of \$1,000,000.00, each share of the par value of \$1.00; and that thereupon the said Charles Peter, defendant herein, pursuant to said conspiracy was designated, elected and installed as the president and general manager of said Idaho corporation.

(27) That on or about the 6th day of March, 1916, the said defendants herein, Charles Peter, together with his co-defendants, having the exclusive charge, control, and management as aforesaid of the said Utah corporation, and also of the said Idaho corporation, unlawfully, wrongfully, and fraudulently cause all of the mining claims and property of the said Utah corporation, including the four patented claims named and referred to in paragraph 18 hereof, and other mining claims and property, all of which being of little or no value, to be transferred and conveyed unto the said Idaho corporation at a wrongful, fictitious and fraudulent valuation of \$650,000.00, payable in stock of the said Idaho corporation to the then shareholders of the said Utah corporation in proportion to their interests in said Utah corporation.

(28) That between the said 6th day of March, 1916, and the present time, the said defendant, Charles Peter, and his co-conspirators issued or caused to be issued, 831,127 shares of the capital

stock of the said Idaho corporation, including an issue to said Charles Peter of 200,000 shares, for the use and benefit of the conspirators herein, in addition to the proportion thereof to which they claimed to be entitled on account of the number of shares in their names in the said Utah corporation at that time, and all of which your complainants allege and state were by the said defendants wrongfully, unlawfully and fraudulently issued or caused to be issued to themselves without consideration for the purpose of further executing their said scheme to defraud, by selling the same to the complainants and the victims herein and the public generally for the individual use and benefit of the conspiring defendants, and for their use and benefit in allowing and permitting them to have and control a sufficient amount of said capital stock to keep them in the control and management of said Idaho corporation and that the said defendants gave nothing of value for said stock.

That upon the organization and incorporation of the said Idaho corporation, the conspiring defendants wrote, sent, authorized, and caused to be written, printed and sent, letters, newspapers, printed pamphlets, publications, and circulars, by and through the United States mails, by reason of which, and also by verbal representations and statements of themselves and certain agents, the names of whom complainants are at this time unable to state, falsely, wrongfully and fraudulently pre-

tended, represented and stated to the complainants and victims herein, that the said mining claims and properties of the said Idaho corporation were of great value as mining property and that by reason of said Idaho corporation being the owner thereof, that the capital stock of the said corporation also was a valuable investment and would pay large dividends to the victims and the public generally purchasing the same, and that the money and funds derived from the sale of the capital stock of said defendant corporation would and should be used to make and develop a mine upon the said property of said defendant corporation and to thereafter equip and operate the same in good faith for the use and benefit of the shareholders of the said defendant corporation generally, and that your complainants herein, and all the victims herein, relied upon and believed to be true, the representations and statements made and cause to be made by said defendants personally, and by and through certain agents, and by and through certain written and printed letter, newspapers, pamphlets, publications and circulars, sent and delivered through the United States mails, and all of which representations and statements, being then and there false, fraudulent and untrue, and the same being heretofore set forth in detail in paragraph 28 hereof, and so relying and believing, did heretofore, upon certain dates which your complainants are at this time unable to state, purchase from the said Charles

Peter and his co-conspirators approximately 200,000 shares of capital stock of the Utah and defendant corporations and for which they paid the said Charles Peter who was then and there president, general manager and a director of said corporation, and his co-conspirators, the sum of approximately \$200,000.00 in cash, all of which said conspirators then and there converted to their own use and benefit.

(29) That the complainants herein at this time are unable to state the exact sums or amounts of money which the said conspirators procured and obtained from the complainants and victims herein by the sales of said capital stock in said Idaho corporation, and wrongfully, unlawfully, and fraudulently converted to their own use and benefit; but in relation thereto, allege and state the fact to be that according to their best knowledge, information and belief, from all of the sale of the said capital stock of said Idaho corporation, as aforesaid, the said defendants wrongfully, unlawfully, and fraudulently received and converted to their own use and benefit the sum of approximately \$200,000.00, or more, and the said Idaho corporation received nothing.

(30) Your complainants further allege and state that according to their best information, knowledge, and belief, between the 16th day of March, 1916, and the present time, the said defendant, Charles Peter, was the president and general

manager and together with his co-conspirators had exclusive control and management of all the affairs of the said Idaho corporation, including the sale of its capital stock and the receipt and disbursement of the money and funds derived therefrom; and that by reason thereof the said defendant, Charles Peter and his co-conspirators *was* able to and did wrongfully, unlawfully, and fraudulently neglect and fail to manage and conduct the affairs of the said Idaho corporation on behalf of and in the interest of its shareholders, including the complainants and victims herein; but on the other hand, did at all times intentionally, knowingly, unlawfully, wrongfully, and fraudulently conduct the affairs of the said Idaho corporation for the individual use and benefit, and private gain of said conspirators.

(31) That from the time of the organization and incorporation of the Idaho company, on or about the 6th day of March, 1916, up until the present time, the said defendant herein, Charles Peter, and his co-conspirators, then and there at all times having the entire control and management of the said Idaho company, wholly and entirely, wrongfully, unlawfully, and fraudulently failed and refused to competently and properly mine or develop the said mining claims and property owned by the said Idaho corporation; but on the other hand only caused such work to be done or pretended mining activity to be shown, as was by them deemed necessary and advisable to deceive the com-

plainants and the victims herein, in order that the said scheme to defraud would not be by them discovered, and to aid them in the further execution of their said scheme to defraud; and that during all of said time no ore was mined or milled or sold by the said Idaho corporation and no profit or gain made by it; and that during all of said time the said defendant, Charles Peter, and his co-conspirators wholly and entirely, wrongfully, unlawfully, and fraudulently refused and neglected in any manner to use the money and funds derived from the sale of its stock or any part thereof towards the development and making of a mine upon its said mining claims and property, and that under the said management and control of said Idaho corporation by the said Charles Peter and his co-conspirators, on or about July 31, 1920, the said Idaho corporation had outstanding or issued capital stock to the extent and amount of 831,127 shares, and had no money or funds in the treasury; was wholly and entirely and hopelessly insolvent and unable to conduct business, and its said properties wholly and entirely undeveloped; and at that time had standing against it upon its books an alleged false, and untrue and fraudulent, indebtedness in the sum of \$77,425.96, which indebtedness was then and there incorrect, unjust and fraudulent, and then and there claimed by the said defendant, Charles Peter, as a valid indebtedness against said Idaho corporation for and on account of money

claimed and alleged by the said Charles Peter and to have been loaned in good faith by him individually to said Idaho corporation, when in truth and in fact said alleged indebtedness was, as aforesaid, fictitious, untrue, false and fraudulent, and created and claimed by the said defendant, Charles Peter, as part of and in aid of said scheme to defraud.

(32) That on or about the 11th day of January, 1917, the said defendant, Charles Peter, together with the defendant herein, J. M. Stevens, and other persons, created, organized and incorporated under the laws of the State of Idaho, a corporation known and designated as the Terra Mining & Milling Company, with an authorized capital stock of \$500,000.00, divided into 500,000 shares of the par value of \$1.00 each.

And that at said time and at all the times herein mentioned, the said defendants Charles Peter and J. M. Stevens, and other persons, for the use and benefit of the conspirators herein, controlled the said corporation and were the owners of the capital stock thereof; and that the said Charles Peter and J. M. Stevens were two of the chief and principal owners of said stock and entitled to share largely in the profits of said company.

And that thereafter, on or about the . . . day of, A. D., . . . , the exact or correct date your complainants herein are unable to state, the said defendant, Charles Peter, and his co-conspirators then and there having the management and

control of the said Idaho corporation as aforesaid, and also being the principal owners of and having control and management of the said Terra Mining & Milling Company aforesaid, negotiated and consummated a sale by and between themselves as the chief and principal owners of the said Terra Mining & Milling Company, and themselves as the chief and principal owners and manager of said Idaho corporation, whereby the said Terra Mining & Milling Company transferred and conveyed unto the said Idaho corporation six mining claims in Blaine County, Idaho, a more detailed or definite description of which the complainants are unable to state, but all of which said mining claims involved in said transaction, the complainants allege and state were at said time of little or no value, and for which the said Idaho corporation paid to the said Terra Mining & Milling Company the sum of \$30,000.00 as follows, to-wit: 20,000 shares of the capital stock of the said Idaho corporation, which said 20,000 shares were transferred at a valuation of \$10,000.00; and \$20,000.00 in cash each, all of which, or the principal part of which said purchase price of \$30,000.00 as aforesaid, was by such manner and means received and accepted by the said defendant, Charles Peter and his co-conspirators and converted to their own use and benefit, and for which the said Idaho corporation received only such said six mining claims of little or no value; and all of which the complainants herein allege and

state, and according to their best knowledge, information and belief, were acquired by the said Charles Peter and his co-conspirators on behalf of said Terra Mining & Milling Company for a sum not to exceed \$1500.00.

And that according to the best knowledge, information and belief of your complainants herein, the said defendant, Charles Peter, and his co-conspirators, together with other persons, caused to be organized, created and incorporated, said Terra Mining & Milling Company, not for the purpose of in good faith promoting, building and maintaining a general mining business thereby, but that the said conspirators might use said Terra Mining & Milling Company and its name with the intent and for the purpose of deceiving the complainants and victims herein into believing that the transactions had been between the Idaho corporation and the said Terra Mining & Milling Company were in good faith, legitimate, honest and honorable transactions, and to conceal as far as could be done from the complainants and victims herein the fact that in purchasing the property for the Idaho corporation from the Terra Mining & Milling Company at excessive and fraudulent valuations and prices that the said conspirators were thereby unlawfully, wrongfully and fraudulently accepting, retaining and converting to his own use and benefit the money and funds of the complainants and victims, and the said Idaho corporations.

(33) That from and after the 4th day of September, 1915, and up until the present time, the defendant herein, Charles Peter, for and on account of his alleged service to said Utah corporation and to the said Idaho corporation, as the president and manager thereof, unlawfully, wrongfully, and fraudulently paid to himself from the moneys and funds belonging to said corporation, the sum of \$6,836.00 in cash, and \$6,940.00 in stock, all of which the said Charles Peter unlawfully, wrongfully and fraudulently converted to his own use and benefit, and for all of which he paid nothing of value to said corporation, and for all of which he rendered no service to said corporations.

(34) That on or about the 25th day of August, 1920, the said defendant, Charles Peter, and his co-conspirators having the entire management and control of the said Idaho corporation, by reason of owning and controlling a majority of the outstanding shares of its capital stock, which were then and there illegally and unlawfully held in their names and in the names of others, and having paid nothing of value therefor, at a shareholders' meeting held at Pocatello, Idaho, passed and caused to be passed a resolution directing and authorizing the Board of Directors, who were then and there also contemporaneously elected and chosen by the said conspirators to the effect that the false and fraudulent claim of said defendant, Charles Peter, in the sum of \$77,524.96 be allowed and approved

and that said conspirators as the said Board of Directors of the defendant corporation be and were authorized to execute and deliver to the said Charles Peter, the Idaho corporation's promissory note or notes in like amount, secured by first mortgage lien upon all of said mining claims and properties owned in the name of the said Idaho corporation; and that at said meeting aforesaid and in the manner aforesaid, the said conspirators passed and caused to be passed and adopted a resolution, purporting to change and alter the by-laws of said Idaho corporation to the effect that all of its capital stock should be thereafter assessable instead of fully paid and non-assessable as it then existed, and both of which resolutions your complainants herein allege and state were illegal, unlawful, wrongful and fraudulent, also so passed or caused to be passed and adopted by the said conspirators as aforesaid, not in good faith for the purpose of securing the payment of the legitimate indebtedness of said corporation and raising money and funds with which to carry on in good faith a general mining business, but on the other hand were so passed and caused to be passed and adopted by the said conspirators, wrongfully, unlawfully and fraudulently for the express and specific purpose of depriving, destroying and cancelling all of the right, title and interest of the complainants herein in and to said Idaho corporation and its properties, or compelling them to pay his said unlawful and fraudulent

claim and recognize and continue his wrongful unlawful, and fraudulent management of said Idaho corporation.

(35) That pursuant to said defendants' conspiracy and scheme to defraud herein set forth, and in order to effect the purpose thereof and execute the common design thereof and in order to unlawfully, wrongfully and fraudulently cheat and defraud the complainants herein and deprive them of all their right, title and interest in the property and assets of the defendant corporation as shareholders thereof, the said defendant conspirator herein, Ferdinand Walther instituted a certain action in the district court of the Fifth Judicial District of the State of Idaho in and for the county of Bannock, entitled case No., Ferdinand Walther, plaintiff vs. Mascott Mining & Milling Company, a corporation, defendant, by filing in said court and in said cause his complaint as such plaintiff and therein wrongfully, falsely and fraudulently representing and claiming and stating that the said defendant corporation aforesaid was indebted to him in the sum of \$5594.95, with interest and also that said defendant corporation was indebted to its president and general manager, to-wit: the defendant herein, Charles Peter, in approximating the sum of \$83,000.00 and that said defendant corporation was insolvent, inactive and without income, money, funds, or property of any kind or description except certain non-producing mining

claims and also praying for a judgment against said defendant corporation for the amount of his alleged claim, and for judgments and orders allowing the said alleged claims of said defendant Charles Peter, and for the appointment of a receiver for the purpose of winding up the affairs of the defendant corporation and selling said defendant corporation's mining claims for the purpose of paying his alleged claim and the alleged claim of the said defendant, Charles Peter aforesaid.

That the statements and allegations contained in said complaint and said action to the effect that the defendant corporation was indebted to the plaintiff in the sum aforesaid, was and is false, fraudulent and untrue, and known to all the conspirators herein at all times to be false, fraudulent and untrue, and that in truth and in fact, the said defendant corporation was and is not indebted to the said Ferdinand Walther in any sum whatsoever, and that the said alleged cause of action of the said Ferdinand Walther based upon said claim was and is false, fraudulent, fictitious and untrue.

That the statement and allegation contained in said complaint in said action to the effect that the defendant corporation was indebted to its said president and general manager, to-wit, the defendant herein, Charles Peter in approximately the sum of \$83,000 was and is false, fraudulent, fictitious and untrue and at all times known to all of said conspirators to be false, fraudulent; fictitious and un-

true, and that in truth and in fact the said defendant corporation was not and is not indebted to the said defendant, Charles Peter in any sum whatsoever.

In relation to the allegations contained in said complaint to the effect that said defendant corporation was insolvent, inactive and without money or funds, the complainants allege and state that such conditions existed and were caused to be existed by the conspirators herein as a result of and for and on account of their said conspiracy and scheme to defraud and all of their acts and conduct hereinbefore set forth in carrying said scheme into effect and executing the same.

Your complainants further allege and state that the defendants herein, Charles Peter and Ferdinand Walther and his co-conspirators did then and there and at all times well know that the said alleged claims as set forth in said complaint in said cause were false, fraudulent and untrue, but that nevertheless in order to fully and completely cheat and defraud the complainants herein, pursuant to said conspiracy and scheme to defraud, and in order to deprive complainants of all their right, title and interest in and to the property and assets of the defendant corporation, the said defendant corporation in said cause of action pending in said district court of Bannock County, Idaho, aforesaid, acting by and through its president and general manager and its directors, to-wit: the defendant, Charles

Peter and Ferdinand Walther and their co-conspirators, wrongfully, unlawfully, fraudulently and intentionally failed, refused and neglected to contest said cause of action, and by reason thereof permitted and caused to be entered and rendered without competent or truthful evidence or testimony of any kind or character, an order appointing the defendant, E. S. Sloane as a receiver of said defendant corporation, a true and correct copy of said order being hereto attached, marked "Exhibit A" and by this reference made a part hereof, and thereafter unlawfully, wrongfully and intentionally failed, neglected and refused to contest said cause of action, and filed and caused to be filed therein its written confession of judgment in favor of the plaintiff therein to-wit: the conspirators herein Ferdinand Walther and against the defendant corporation, said written confession of judgment admitting and confessing as true the false, fraudulent, fictitious and untrue claims of the said conspirators, Ferdinand Walther, in said action and that by reason of said conspiracy, wrongfully, unlawfully, fraudulently and intentionally failed, refused and neglected to contest said cause of action, whereby a final judgment of said district court of Bannock County, Idaho, was made and entered in said cause of action, a true and correct copy of which being hereto attached, marked "Exhibit B" and by this reference made a part hereof, and that by reason of the said defendants' conspiracy in fail-

ing, neglecting and refusing to contest said cause of action and wrongfully and fraudulently in the manner aforesaid permitting said final judgment "Exhibit B" to be made and entered, there was also thereafter on the 31st day of May, 1921, an order for receiver's sale made and entered in said cause of action, a true and correct copy of the same being hereto attached, marked "Exhibit C" and by this reference made a part hereof.

(36) Your complainants further allege and state the fact to be that said orders and final judgments therein, "Exhibits A, B and C" were and are obtained by the said conspiring defendants herein unlawfully and fraudulently as hereinbefore set forth, and that the same are and constitute false, fraudulent and fictitious orders and judgments, and in truth and in fact are not legal nor binding upon any of the parties to the said action in which they were made and entered, and that the same should be set aside, cancelled and held for naught.

(37) That all the complainants herein were shareholders of said defendant corporation, to-wit: the Mascot Mining & Milling Company, Ltd., of Idaho, at the time of the transactions of which the complainants complain herein, and that this suit is not a collusive one to confer on a court of the United States jurisdiction of a cause of which it would not otherwise have cognizance.

(38) That the conspirators herein, to-wit: Charles Peter, J. M. Stevens, A. J. Weber, Arthur

H. Freber, W. R. Calvert, Ferdinand Walther, Frand Van der Linde, William Jacobson and R. E. Roser, are and constitute the board of directors and managing officers of the said defendant corporation, to-wit: The Mascot Mining & Milling Company, Ltd., of Idaho, and that said defendant corporation is wholly and exclusively managed and controlled by said conspirators herein, and that none of the complainants herein nor victims nor any other person have any right, privilege or authority in connection with the management and conduct of the affairs of said defendant corporation, and that by reason thereof and the facts generally heretofore set forth in this complaint, your complainants further allege and state to the court that it would of necessity be futile, unavailing and an idle ceremony for them to have first made a request of the said conspirators as said directors and managing officers of the defendant corporation or of said fraudulently appointed receiver to bring this action prior to its institution by the complainants herein.

(39) Your complainants further allege and state that from and with the moneys and funds unlawfully, wrongfully and fraudulently obtained from them by the conspirators herein in the execution of their conspiracy and scheme to defraud, the defendant Charles Peter, invested a part and portion of the complainants' moneys and funds so unlawfully, wrongfully and fraudulently received and

obtained by him, the exact amount of which your complainants being at this time unable to state, incertain mining claims and mining properties located and situated in Blaine County, Idaho, and more particularly described as follows, to-wit:

Nevada (amended), recorded July 16, 1916; Idaho, (amended), recorded July 16, 1916; Lisette (amended), recorded July 6, 1916; Venus (amended), recorded Oct. 15, 1915; Jupiter (amended), recorded Oct. 15, 1915; Terra (amended), recorded Oct. 7, 1915; Mars (amended), recorded Oct. 7, 1915; Summit (amended), recorded July 6, 1916; Helen (amended), recorded July 6, 1916; Columbia (amended), recorded July 6, 1916; O. K. (amended), recorded July 6, 1916; Columbia No. 1, located September 15, 1920; Columbia No. 2, located September 15, 1920; Terra Nos. 2, located September 15, 1920. All of said claims being in the Little Wood River Mining District of the State of Idaho, and recorded in the Mining Records of the County of Blaine, in said State.

And that in purchasing and acquiring said mining claims and properties aforesaid with the money and funds then and there belonging to the complainants and victims herein, but which had then and there been so unlawfully and fraudulently obtained from them by the said Charles Peter as aforesaid, the said Charles Peter caused the legal title to said mining property and mining company to be taken and placed in his name individually.

Your complainants further allege and state that from and with a portion of the moneys and funds

unlawfully, wrongfully, and fraudulently obtained from them by the conspirators herein in the execution of their conspiracy and scheme to defraud the defendants herein invested a part and portion of the complainants' money and funds so unlawfully, wrongfully and fraudulently received and obtained by them, the exact amount of which your complainants being at this time unable to state, in certain mining claims and mining properties located and situated in Blaine County, Idaho, and more particularly described as follows, to-wit:

“Certain patented and unpatented lode mining claims located in the Warm Springs Mining District in Blaine County, State of Idaho, more particularly described as follows: Patented Lode Mining Claims—Oregonian, Silver Fortune, Snow Clad and P. K. and unpatented Lode Mining Claims—Snow Cap Fraction, Louise, Lydia, Gem, Snow Cap, Silver Cord, Snow Slide, Utah, Ohio, Mascot No. 1, Mascot No. 2, Mascot No. 3, Mascot No. 4, Mascot No. 5, Mascot No. 6, Mascot No. 7, and Mascot No. 8, Alturas, Flat, Atlas, Salt Lake, all of said mining claims in Blaine County, Idaho, together with all of the personal property located on said claims belonging to the said defendant corporation;

and that in purchasing and acquiring said real and personal property and mining claims and properties aforesaid with the money and funds then and there belonging to the complainants and victims herein, but which have been and there been so unlawfully and fraudulently obtained from them by the said defendants, the said defendants caused the

legal title to said real and personal property and mining properties to be taken and placed in the name of the defendant corporation, to-wit: the Mascot Mining & Milling Company, Ltd., of Idaho.

That the above described mining claims and mining properties constitute real estate and personal property purchased and acquired by the defendant, Charles Peter, and his co-defendants with the moneys and funds of the complainants and victims herein, and obtained from them by the said defendants, through and pursuant to the general conspiracy and scheme to defraud, and the execution thereof as herein set forth, and that the said defendant, Charles Peter and his co-defendants have no right, title interest or estate in, to, upon or against said real estate and personal property or any part thereof, and that in purchasing and acquiring the legal title thereto, the said Charles Peter and his co-defendants paid therefor no money or property or thing of value, except the money and funds belonging to the complainants and victims herein.

(40) That the complainants herein are the legal and equitable owners of all of said real estate and personal property and entitled to the immediate possession thereof, and are entitled to have the legal title thereto conveyed and transferred to them or decreed by the court to be held by the defendant, Charles Peter and the Mascot Mining & Milling

Co., Ltd., of Idaho in trust for the use and benefit of complainants and victims herein.

That the defendants, Charles Peter and the Mascot Mining & Milling Co., Ltd., of Idaho, claim some right, title, interest or estate in, upon and against the said real estate and personal property last above described, adverse to the claims therein of the complainants and victims herein. In relation to which, however, your complainants allege and state the fact to be that whatever right, interest or estate the said defendants may have or claim to have, in, to, upon or against said real estate and personal property, or any part thereof, that the same and all thereof is wholly junior, inferior, subject and subsequent to the demands, title, estate and rights of the complainants and victims herein.

(41) That your complainants herein are the owners and holders of approximately 200,000 shares of the capital stock of said defendant corporation, for all of which said complainants have paid value to the conspirators herein, and by reason thereof and all the facts hereinbefore stated, have been cheated and defrauded by the conspirators herein, of their moneys, properties and funds in the sum of approximately \$200,000.00 or more.

(42) That the complainants herein have no adequate remedy at law.

(43) That at all times mentioned herein, and that at the present time, the said defendant, Charles Peter and his co-conspirators have been

wrongfully usurping and still do usurp the entire control and management of the said Idaho corporation, by reason of which they have promoted and executed, and still are promoting and executing their said scheme to defraud as herein set forth; and that the said conspirators will continue so to do unless restrained by this Court, and unless a disinterested receiver for the said Idaho corporation is appointed until the management and control of said Idaho corporation is restored to the complainants herein, its real and proper owners.

(44) That unless restrained by this Court from so doing, the defendants herein, during the pendency and before the trial of this action, will transfer to strangers and innocent persons, or alleged innocent persons, the real estate and personal property mentioned and described in paragraph 39 hereof, all of which was purchased with the money and funds of the complainants and victims herein, in the manner and form as set forth in said paragraph.

And that unless restrained by this Court from so doing, the said defendants, Charles Peter and his co-conspirators, during the pendency and before the trial of this action, will transfer to strangers, innocent person, or alleged innocent persons, all of the stock in their names on the books of the Idaho corporation, or stock in the names of others held for their own use and benefit.

(45) That this action is instituted and maintained on behalf of complainants and all other shareholders of the defendant corporation similarly interested and situated.

WHEREFORE, COMPLAINANTS PRAY:—

(A) For the process of subpoena issued against the defendants and each of them separately, conformably to the practice and rules of this Court in equity suits.

(B) For an accounting between the complainants and all of the defendants conformably to the practice and rules of this Court and principles of equity; and for the determination by such accounting of the amounts and sums of money wrongfully obtained and converted by the said defendant, Charles Peter and his co-conspirators by virtue and reason of their said scheme to defraud; for the determination by said accounting of the amount and extent of all the invalid and unlawful shares of stock issued in said Idaho corporation and held in the name of the defendant, Charles Peter, and his co-conspirators and the names of others for their use and benefit; for a determination of such accounting of all the amounts of money due the complainants from the defendants or any or either of them; and for the determination of such accounting of the liability to the complainants herein and the extent thereof by any, all or either of the defendants as may be found liable under and by reason of the matters hereinbefore set forth, and for

a discovery and disclosure by said defendants and each and all of them the facts, and the reproduction of all books, accounts, letters, documents, writings of whatever kind relevant to such accounting.

(C) For the judgment and decree of this Court against the said defendants herein, or any or all or either of them for such sums of money, or the delivery or conveyance of property for which it is determined they are liable herein to the complainants.

(D) For judgment and decree of this Court against the defendant, Charles Peter and his co-conspirators, for restitution of the sum of \$200,000.00, or more as may be determined by such accounting.

(E) For judgment and decree of this Court specifically adjudging and decreeing that the said defendant, Charles Peter, hold the legal title to all of the following described real estate and personal property, to-wit:

Nevada (amended), recorded July 16, 1915; Idaho (amended), recorded July 15, 1916; Lisette (amended), recorded July 6, 1916; Venus (amended), recorded Oct. 15, 1916; Jupiter (amended), recorded Oct. 15, 1915; Terra (amended), recorded Oct. 7, 1915; Mars (amended), recorded Oct. 7, 1915; Summit (amended), recorded July 6, 1916; Helen (amended), recorded July 6, 1916; Columbia (amended), recorded July 6, 1916; O. K. (amended), recorded July 6, 1916; Columbia No. 1, located September 15, 1920; Columbia No. 2, located September 15, 1920; Terra No. 2, located September 15, 1920. All of said

claims being in the Little Wood River Mining District of the State of Idaho, and recorded in the Mining Records of the County of Blaine, in said State;

in trust for the use and benefit of the complainants herein, or the said Idaho corporation as may be determined and that the Court further specifically adjudge and decree that the said defendant Charles Peter transfer and convey to the complainants herein, by proper instrument of conveyance the legal title to said real estate and personal property, which is held by him in his name; and that the right, title, interest and estate of the complainants, in, to, upon and against said real estate and personal property be sustained and established, and that their title to said real estate and personal property and the possession thereof be quieted, and that the said defendants, Charles Peter and all persons claiming by, through or under him since the commencement of this action, be forever barred and divested from having or claiming to have any right, title or estate in, upon or against said real estate or personal property.

(F) For a restraining order to be issued forthwith to be followed by a preliminary and temporary injunction of like import as soon as may be, restraining and enjoining the defendants and each of them until after trial and final decree herein, and the further order of this Court, from transferring on the books of the said Idaho corporation or by delivery of certificates of any stock now held

or standing in the name or controlled by said defendants, or any or all or either of them; or from in any maner changing the present status of such stock or of the books of account of the said Idaho corporation; and restraining and enjoining the defendant, Mascot Mining & Milling Company, Ltd., of Idaho from paying any money to or delivering any property to the defendants, or to any other person for their use and benefit; and further restraining and enjoining the defendant herein, Charles Peter, from in any maner selling, attempting to sell, pretending to sell, transferring or conveying, or in any manner giving away any of the real estate and personal property hereinbefore described.

(G.) For the appointment of a receiver of the said defendant, Mascot Mining & Milling Company, Ltd., of Idaho, under the control of this Court, as soon as may be, to take from the said Charles Peter, and the defendants herein, the management and control of the affairs of the said Idaho corporation until after the final decree and until the further orders of this Court, in order that the said defendant, Charles Peter and his co-conspirators may be effectively stopped from the further execution of his said scheme to defraud; and in order that all of the books, accounts, letters, documents and writing of whatever kind or nature belonging to or which have been kept by the said defendant, the Idaho corporation, from being mutilated, altered, changed, or removed from the jurisdiction of this Court; and

for the further reason of having the charge, management and control of the said defendant Idaho corporation until proper actions are instituted and determined, cancelling all of the invalid shares of stock on the books of the Idaho corporation in the name of Charles Peter and his co-conspirators and other persons for their use and benefit; and to have the management and control of the said defendant Idaho corporation until the complainants herein and all the shareholders similarly situated who have paid value of their stock, may meet and organize, and effect a proper and legal Board of Directors to take and assume the management of said Idaho corporation.

And that such receiver have full power an authority from this Court to institute, prosecute and maintain any and all suits against the defendants herein, or any or either of them, or any other persons to recover any money or property, the relief for which could not be granted in this action. And that said receiver be also authorized and directed to institute, prosecute and maintain any and all actions against the said defendants, or others, for the cancellation of unlawful fraudulent and invalid stock claimed or held by them or any or either of them.

(H) That the Court render and enter a judgment and decree setting aside, cancelling and holding for naught the order appointing receiver, Ex-

hibit A: the final judgment of the Court, Exhibit B: and the order for receiver's sale, Exhibit C.

(I) For judgment and decree of this Court specifically adjudging and decreeing that the defendant corporation, to-wit, Mascot Mining & Milling Company, Ltd., of Idaho hold the legal title to all of the following described real estate and personal property to-wit:

“Certain patented and unpatented lode mining claims located in the Warm Springs mining district in Blaine County, State of Idaho, more particularly described as follows: Patented Lode Mining Claims—Oregonian, Silver Fortune, Snow Cap and P. K. and unpatented Lode Mining Claims—Snow Cap Fraction, Louise, Lydia, Gen, Snow Cap, Silver Cord, Snow Slide, Utah, Ohio, Mascot No. 1, Mascot No. 2, Mascot No. 3, Mascot No. 4, Mascot No. 5, Mascot No. 6, Mascot No. 7, and Mascot No. 8, Alturas, Flat, Atlas, Salt Lake, all of said mining claims in Blaine County, Idaho, together with all of the personal property located on said claims belonging to the said defendant corporation;

in trust for the use and benefit of the complainants herein, and that the Court further specifically adjudge and decree that the said defendant, to-wit, Mascot Mining & Milling Company, Ltd., of Idaho, transfer and convey to the complainants herein by a proper instrument of conveyance the legal title to all said real estate and personal property which is held by it in its name; and that the right, title and estate of complainants in, to, upon and against said real estate and personal property be sustained and established and that the title to said real estate

and personal property and the possession thereof be quieted and that the said defendant corporation, to-wit: Mascot Mining & Milling Company, Ltd., of Idaho, and all persons claiming by, through or under it, since the commencement of this action be forever barred and divested from having or claiming to have any title, interest or estate in, upon or against said real estate or personal property.

(J) For such other orders, judgment, decrees, and equitable relief to which these complainants may be entitled in equity, and which to the Court may seem just and proper under the evidence and pleadings in this cause, and for judgment for costs of this action

HOMER N. BOARDMAN,
301 Empire Bldg.,
Oklahoma City, Okla.
B. A. CUMMINGS, and
ROSS W. BATES,
Room 7, Cook Bldg.,
Pocatello, Idaho.

State of Oklahoma,)
)ss.
County of Oklahoma.)

We, the undersigned, William Klien and Henry Kamp, two of the complainants named in the attached complaint in equity of lawful age, after being first sworn duly, do depose and say: That they know the contents thereof and that the allegations therein set forth are true, except as to matter therein stated on information and belief, and that as to

such allegation and statements they believe the same to be true.

WM. KLEIN,
HENRY KAMP,

Subscribed and sworn to before me this 20th day of June, A. D. 1921.

JESSIE GROVE,
(N. P. SEAL) *Notary Public.*
My Commission Expires May 26, 1923.

EXHIBIT A.

*In the District Court of the Fifth Judicial District
of the State of Idaho, in and for the
County of Bannock.*

FERDINAND WALTHER,

Plaintiff,

vs.

MASCOT MINING & MILLING COM-
PANY, a Corporation,

Defendant.

ORDER APPOINTING RECEIVER.

(No. 4607: Filed Oct. 14, 1920. R. O. Earley,
Clerk of District Court by Lillian Spongberg,
Deputy.

Upon motion of the plaintiff in the above entitled court and cause, and upon the Court's order to show cause directed to the defendant corporation in the above entitled action, having come regularly on to be heard this 12th day of October, 1920, upon the pleadings and files in the above entitled court and cause, and the affidavit of the plaintiff herein,

the plaintiff appearing by N. E. Snell, Attorney, and, the duly authorized agent of the defendant corporation appearing for and on behalf of the said corporation, and upon the presentation of this cause to the Court, good cause appears, and this appearing to be the case in which a receiver should and may be appointed under Subdivisions 1 and 5 of Section 6817 of the Compiled Statutes of Idaho, 1919, and the plaintiff and defendant having agreed upon E. S. Sloane as Receiver:

IT IS THEREFORE ORDERED:

1. That the defendant, The Mascot Mining & Milling Company, a corporation, deliver to the Receiver herein all its assets and property, real and personal, located in Bannock County and Blaine County, Idaho.

2. That E. S. Sloane of Pocatello, Bannock County, Idaho, is hereby appointed Receiver to take charge, control and custody of the defendant's assets and property, real and personal which is located in Bannock County and Blaine County, Idaho.

2. Thatof Pocatello, Bannock County, Idaho, is hereby appointed receiver to take charge of the property and assets of the defendant corporation, and to take and keep the property of the defendant in his possession, to protect and preserve the said property of the said defendant and to do such other and further acts

respecting the property of said defendant as the Court may authorize.

3. That the said receiver is hereby authorized and directed to cause the other creditors of the defendant corporation to file and list with this receiver their claims against the defendant corporation.

4. That the said receiver is hereby authorized and directed to sell at receiver's sale either publicly or privately the property of the defendant corporation, the Mascot Mining & Milling Company, and authorized and directed to apply the proceeds derived from said sale to the payment of the debts owing by said corporation.

5. That this order is to become effective upon the filing with the Clerk of the above Court a good and sufficient bond approved by this Court in the sum of \$5000.00 and the said bond of the said E. S. Sloane as receiver is hereby approved.

Dated at Pocatello, Idaho, this 12th day of October, 1920.

(Signed)

O. R. BAUM,
District Judge.

“EXHIBIT B.”

*In the District Court of the Fifth Judicial District
of the State of Idaho, in and for
Bannock County.*

FERDINAND WALTHER,

Plaintiff,

vs.

THE MASCOT MINING & MILLING
COMPANY, a Corporation,*Defendant,*

and

G. ADOLF LOBNER,

Intervenor.

JUDGMENT.

Now, on this 31st day of May, 1921, the above entitled cause came regularly on for hearing before the Honorable Ralph W. Adair, District Judge of the Sixth Judicial District of the State of Idaho, sitting in open court in the City of Pocatello, Bannock County, Idaho.

The plaintiff appeared by and through his counsel, N. E. Snell. The defendant, the Mascot Mining & Milling Company, a corporation, appeared by and through its counsel, P. C. O'Malley. The intervenor in said cause appeared by and through his counsel, Ross W. Bates. The receiver in said action, E. S. Sloane, appeared by and through his counsel, H. E. Ray. Said receiver being present before the Court.

That on the 27th day of May, 1921, the Honorable O. R. Baum, one of the judges of the Fifth Judicial District for good cause appearing called in to hear said cause to a full and complete determination of said cause the Honorable Ralph W. Adair, Judge of the Sixth Judicial District.

That at the call of the trial of said cause the Intervenor, by his attorney, Ross W. Bates, moved to dismiss the complaint in intervention filed by said Receiver. No objection being made to the motion the Court ordered the complaint in intervention dismissed upon the motion filed.

Thereupon the Court proceeded to hear and determine the issue in said cause. The plaintiff introduced evidence in support of his claim and rested his cause. Proof was then submitted upon the other claims filed with the receiver in said action. The receiver of said cause, E. S. Sloane, then introduced proof in support of the items of expense of the said receiver and the same, being the report of the expenses was marked as an exhibit in said cause and admitted by the Court. No further evidence being introduced the Court took said cause under advisement for decision.

Upon the close of said evidence a stipulation was filed with the Court, signed by the attorneys for the respective parties herto, namely: N. E. Snell, counsel for the plaintiff; P. C. O'Malley, counsel for the defendant, and H. E. Ray, attorney for the receiver appointed by the Court, that findings of fact and conclusions of law might be waived and that judgment be entered in said cause with the same force and effect as though the same had been fully and completely made. And the Court approving of said stipulation as to a waiver of the findings of fact and conclusions of law does not

make any findings of fact or conclusions of law other than those set out herein.

This Court does, however, make the following findings of fact:

1.

That on or about the 12th day of October, 1920, the Honorable O. R. Baum, one of the judges of the Fifth Judicial District of the State of Idaho, appointed one E. S. Sloane, Receiver of the defendant corporation, and that the said E. S. Sloane gave his bond and entered upon the discharge of his duties as such receiver and as such receiver took into his possession under order of the Court, all of the property, both real and personal, belonging to the said defendant, which he now has and holds subject to the order of the Court.

2.

That the said defendant corporation on the date of the filings of the complaint in this action was and is insolvent.

3.

That the said receiver, E. S. Sloane, under the order of the Court, took into his possession the following described property, being real and personal as follows:

“Certain patented and unpatented lode mining claims located in the Warm Springs mining District in Blaine County, State of Idaho, more particularly described as follows: Patented Lode Mining Claims—Oregonian, Silver Fortune, Snow Clad and P. K. and unpatented

Lode Mining Claims—Snow Cap Fraction, Louise, Lydia, Gem, Snow Cap, Silver Cord, Snow Slide, Utah, Ohio, Mascot No. 1, Mascot No. 2, Mascot No. 3, Mascot No. 4, Mascot No. 5, Mascot No. 6, and Mascot No. 7, and Mascot No. 8, Alturas, Flat, Atlas, Salt Lake, all of said mining claims in Blaine County, Idaho, together with all of the personal property located on said claims belonging to the said defendant corporation,

and the following personal property belonging to the defendant corporation situated in the City of Pocatello, Bannock County, Idaho, viz:

Office furniture and fixtures located in room 211 in the First National Bank Building in the City of Pocatello, Bannock County, Idaho.

4.

That in order to preserve and protect the property of the defendant, and to effect the purposes of said receivership, the said receiver, E. S. Sloane, has been compelled to and did under the direction and order of the Court borrow certain money which is evidence by certain notes, the dates, amounts and holders of said notes being as follows:

Note Dated	11-30-20	\$1,000.00	Holder	Arthur H. Freber
" "	12-31-20	775.00	" "	" "
" "	1-31-21	850.00	" "	" "
" "	2-28-21	850.00	"	1st Nat'l Bank of Pocatello, Idaho.
" "	4-20-21	750.00	"	F. Moormeister.
" "	4-25-21	250.00	"	Arthur H. Freber.
" "	5-14-21	400.00	"	" " "

All of said notes bearing interest at the rate of 8% per annum from said dates, making a total sum

of principal and interest due to May 31st, 1921, of \$4990.84. That said claims represented by the notes set out above are preferred claims and should first be paid out of the assets now in the hands of this receiver.

5.

That the testimony introduced in support of the plaintiff's claim, and the proof submitted in support of the individual claims of the claimants herein, is free from all objection as to its competency, sufficiency and admissibility and that the material allegations of the plaintiff's complaint in said action have been sustained and that the plaintiff and the other claimants herein named are entitled to judgment on their individual claims as hereinafter ordered.

The Court having carefully considered the said cause and the proof submitted in said cause and being fully advised as to all matter therein contained now orders that judgment be entered as now stated.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT, That Arthur H. Freber have and recover judgment of and from the defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$3,367.00 and that said sum draw interest at the rate of Seven per cent per annum until paid.

That the First National Bank of Pocatello, Idaho, have and recover judgment of and from the de-

fendant, The Mascot Mining & Milling Company, a corporation, the sum of \$867.00 and that said sum draw interest at the rate of seven per cent per annum from this date until paid.

That F. Moormeister have and recover of and from the defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$756.84 and that said sum draw interest at the rate of seven per cent per annum from this date until paid.

That said judgments hereinbefore set out are preferred claims against the defendant The Mascot Mining & Milling Company and must be paid first by said receiver.

IT IS FURTHER CONSIDERED, ORDERED AND ADJUDGED That the plaintiff herein, Ferdinand Walther, do have and recover of and from the defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$6,250.78, and that said sum draw interest at the rate of seven per cent per annum from this date until fully paid.

That the claimant herein, Charles Peter, do have and recover of and from defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$92,479.29 and that said sum draw interest at the rate of seven per cent from this date until fully paid.

That the claimant, Jonas Lorenzen, do have and recover of and from the defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$405.55 and that said sum draw interest at the

rate of seven per cent per annum from this date until fully paid.

That the claimant, L. K. Butts, do have and recover of and from the defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$405.55 and that said sum draw interest at the rate of seven per cent per annum from this date until fully paid.

That the claimant, Henry C. Wolf, do have and recover of and from the defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$405.57 and that said sum draw interest at the rate of seven per cent per annum from this date until fully paid.

That the claimant herein, the Western Powder Company, do have and recover of and from the defendant, The Mascot Mining & Milling Company, a corporation, the sum of \$300.00 and that said sum draw interest at the rate of seven per cent per annum from this date until fully paid.

Done and dated in open Court in the City of Pocatello, Bannock County, State of Idaho, this 31st day of May, 1921.

(Signed)
Judgment Approved:

RALPH W. ADAIR,
District Judge.

.....
Attorney for Plaintiff.

.....
Attorney for Defendant.

.....
Attorney for Receiver.
May 31st, 1921.

“EXHIBIT C”.

*In the District Court of the Fifth Judicial District
of Idaho, in and for the County
of Bannock.*

FERDINAND WALTHER,

Plaintiff,

vs.

THE MASCOT MINING & MILLING
COMPANY, a Corporation,

Defendant,

and

G. ADOLF LOBNER,

Intervenor.

ORDER FOR RECEIVER'S SALE.

WHEREAS, a judgment was made in the above entitled cause on the 31st day of May, 1921, and filed on the first day of June, 1921, allowing a money judgment in favor of the above named plaintiff, and of several creditors claimants, aggregating \$105,217.58, and

WHEREAS, it appears from said judgment that the receiver, E. S. Sloane, is in charge of all of the assets of the defendant, Mascot Mining & Milling Company, and

WHEREAS, it appears that said company is insolvent and that there are no funds in the hands of said receiver to pay said claims allowed in said judgment, and

WHEREAS, it appears that all of the property of said company, defendant, will have to be sold to satisfy said claims, allowed in said judgment,

NOW THEREFORE, IT IS ORDERED: Pursuant to and to satisfy said hereinbefore mentioned judgment and the claims thereunder allowed, That the receiver, E. S. Sloane, of the defendant Mascot Mining & Milling Company, be and he is hereby authorized, empowered and directed to sell at public auction, on the premises of the said Mascot Mining & Milling Company, near Hailey, in Blaine County, Idaho, all of the right, title and interest of the said Mascot Mining & Milling Company, of, in and to all of its real, personal and mixed property of whatsoever kind or character, and including particularly the hereafter described real and personal property, said sale to include the good will of said defendant, Mascot Mining & Milling Company.

IT IS FURTHER ORDERED AND DIRECTED That said property shall be made without the right of redemption and that no redemption shall be allowed after the acceptance of the bid and the confirmation of the sale by the Judge of this Court, and that a deed absolute shall thereupon be made to the purchaser.

IT IS FURTHER ORDERED, That said property be sold for cash, lawful money of the United States, subject to confirmation by this Court.

IT IS FURTHER ORDERED, That notice of this sale be published by said receiver once a week for three successive weeks in a newspaper published at Pocatello, Bannock County, Idaho, and a newspaper published at Hailey, Blaine County, Ida-

ho, and that notices of said sale be posted in accordance with the law of Idaho respecting the sale of real estate under execution, and that at least 20 days' notice of said sale be given by said receiver.

IT IS FURTHER ORDERED, and DIRECTED, That the proceeds of said sale be entrusted to said receiver, E. S. Sloane, to be held by him and applied under direction of the above entitled court, in payment of said claims in said judgment hereinbefore mentioned.

IT IS FURTHER ORDERED THAT said sale be promptly reported by said receiver to this Court for confirmation.

The real property to be sold under this order, among other property of said defendant, is described as follows, to-wit:

The patented and unpatented lode mining claims located in the Warm Springs Mining District in Blaine County, State of Idaho, more particularly described as follows, to-wit:

UNPATENTED MINING CLAIMS: Snow Cap, Fraction, Louise, Lydia, Gem, Snow Cap, Silver Cord, Snow Slide, Utah, Ohio, Mascot No. 1, Mascot No. 2, Mascot No. 3, Mascot No. 4, Mascot No. 5, Mascot No. 6, Mascot No. 7, Mascot No. 8, Alturas, Flat, Atlas and Salt Lake.

UNPATENTED LODGE MINING CLAIMS: Oregonian, Silver Fortune, Snow Clad and P. K., together with all personal property of the said company on said mining claims, patented or unpatented.

All of the above described mining claims being recorded in Book No. 101 of Lode Mining Claims of Blaine County, Idaho, together with any and all water and water rights belonging to said corporation defendant, or in any wise appertaining to said above described lode mining claims;

IT IS FURTHER ORDERED that said receiver sell the personal property of the defendant located in Room 211, First National Bank Building, Pocatello, Idaho, at the site of the location of said property.

Dated: Pocatello, Idaho, June 1st, 1921.

(Signed)

RALPH W. ADAIR,

District Judge.

Endorsed: Filed June 24, 1921,

W. D. McREYNOLDS, Clerk,

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

(No. 307.)

MOTION TO STRIKE AND DISMISS SAID
COMPLAINT FROM FILES AND DOCKET
OF THE COURT.

Comes now the defendant, the Mascot Mining & Milling Co., Ltd., of Idaho, a corporation, one of the defendants named in this bill of complaint and appearing for itself only, moves the Court to strike and dismiss the complaint of complainants from the files and the docket of said Court, and that the defendant, the Mascot Mining & Milling Co., Ltd., takes the costs in this Court incurred for the following reasons:

I.

That this complaint, No. 307 in equity is almost identical in words and substance as the complaint filed in suit No. 263 in equity, which said suit this Court refused to entertain and sustained a demurrer to and which the complainants filed a supplemental and amended complaint and afterwards dismissed the same.

II

That there is an insufficiency of facts to constitute a valid cause of action in equity against this defendant and that said complaint states no cause of action against the defendant.

III.

That it affirmatively appears from the complaint that the District Court of the Fifth Judicial District, County of Bannock, State of Idaho, has already assumed jurisdiction of all the matter pertaining to this suit, all of the property and books belonging to the corporation, the Mascot Mining & Milling Co., Ltd., of Idaho and has appointed a receiver and the said receiver has, under the order of the District Court, taken full possession and control of all the property of the Mascot Mining & Milling Co., all of which affirmatively appears in paragraph thirty-five (35) beginning on page 24 of said amended complaint, which shows affirmatively that the District Court has jurisdiction of the matter and that these allegations in this bill are identical, word for word, with the allegations contained in

bill No. 263, upon which this Court refused to assume jurisdiction and sustained a demurrer to the complaint.

IV.

That it affirmatively appears from the complaint that not only has the District Court of the Fifth Judicial District of Bannock County, Idaho, assumed control and jurisdiction of the property and all of the books and records of the Mascot Mining & Milling Co., but the said complaint shows affirmatively that the District Court did, on the 31st day of May, 1921, make and enter judgment against the defendant for a *large* amount of money, and in favor of this claimant and it affirmatively appears from the complaint that the District Court did, on the 31st day of May, 1921, make an order for a receiver's sale; That this Court has no jurisdiction or right to interfere with the judgments and orders of the District Court.

That the filing of this complaint, it being practically in words and substance, the same complaint that this Court sustained a demurrer to and a motion to dismiss on the 2nd day of May, 1921, comes without merit and is made for no other purpose than to subject this defendant to additional costs and expenses; This defendant alleges that it has been damaged by the filing of this bill in equity, which is nothing more than a subterfuge and frivolous in *it's* character, to the extent of \$500.00; This defendant respectfully requests the said bill of

equity be dismissed and stricken from the files and docket of the Court and that it be allowed the sum of Five Hundred (\$500.00) to pay *its* attorney's fees and expenses for having to appear a second time in this Court on the same complaint that this Court has previously refused to entertain.

P. C. O'MALLEY,

Solicitor for Defendant.

Residence, Pocatello, Idaho.

Service of the foregoing
instrument and a copy thereof
acknowledged this 2nd day of
July, 1921.

ROSS W. BATES,

Solicitor for Complainants,

Residence, Pocatello, Idaho.

Endorsed: Filed July 5, 1921,

W. D. McREYNOLDS, Clerk,

(Title of Court and Cause.)

(No. 307.)

MOTION TO STRIKE.

Comes now the defendant J. M. Stevens and for himself individually moves to strike the complaint filed by the complainants herein for the reasons and upon the grounds as follows:

1.

That the pleading is sham, frivolous and not based upon any fact or facts, and is not brought in good faith by the complainants herein.

2.

That in the prayer of relief asked for in said cause the complainants herein are asking for the appointment of a receiver for the defendant, Mascot Mining & Milling Company, Limited, of Idaho, and that in the body of the complaint the said complainants show that the State Court in the latter part of 1920 and before the filing of case No. 307 in equity in this Court, a suit was brought by Ferdinand Walther, plaintiff against the Mascot Mining & Milling Company, and in said cause an application was made for a receiver of the defendant corporation, made upon an order to show cause, and that upon said return to said order, one E. S. Sloane was appointed receiver of the Court and was appointed the receiver of the Mascot Mining & Milling Company, the same being the exact and the same corporation as is here made a defendant; that said receiver filed his bond and entered upon the discharge of his duty and took possession of all of the property of the defendant corporation, including its real, personal and mixed property, all of its choses of action and all other property of whatever description, and that the said defendant corporation is still in the hands of the receiver, and that the receiver is not at this date and was not on the date of the filing of the complaint herein, discharged from his official capacity, and that as such receiver he is still in charge of the property of the defendant corporation.

3.

That the said complainants do not have legal capacity to sue for the reason that the affairs of the defendant corporation are in the hands of a receiver at this time, and that the only person authorized to bring any suit such as is stated in the body of the complaint in equity filed herein being number 307, is the receiver in this action.

4.

That before said suit can be maintained by these complainants it is necessary that a demand be made either upon the receiver or upon the directors of the defendant corporation to institute on or in behalf of said complainants.

5.

That the Federal Court has no jurisdiction over this action for the reason that prior jurisdiction has been established in the State Court, more especially noted as the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County.

WHEREFORE, this defendant J. M. Stevens prays that said complaint be dismissed herein and that he have and recover his costs herein expended.

DOUGLAS MOTE,

Attorney for Defendant

J. M. Stevens,
Pocatello, Idaho.

Service of the above paper and a copy thereof acknowledged this 6th day of July, 1921.

ROSS W. BATES,

.....

Attorneys for Complainants.

Endorsed: Filed July 6th, 1921,

W. D. McREYNOLDS, Clerk,

MINUTE ENTRY.

At a stated term of the District Court of the United States for the District of Idaho, held at Pocatello, Idaho, on October 10, 1921, the following proceedings were had, to-wit:

PRESENT: Hon Frank S. Dietrich, Judge,
 and the other officers of the Court.

William Klein, et al.)	
vs.)	Civil No.307.
Charles Peter et al.)	

The motion to dismiss was argued before the Court by counsel for the respective parties, after which the Court announced his decision, granting the motions and dismissing the cause, with exceptions allowed the plaintiff to the order.

 (Title of Court and Cause.)
 No. 307.

FINAL DECREE.

This cause came on to be heard on the 10th day of October, A. D., 1921, upon the motions filed herein by the defendants, Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, and J. M. Stevens, to strike and dismiss the complainants' Bill in Equity, filed herein, and Messrs. Homer N. Boardman and Ross W. Bates having been heard

on the part of the complainants; and Mr. P. C. O'Malley, having been heard on the part of the defendant, Mascot Mining & Milling Company; and Mr. Douglas D. Mote, having been heard on the part of the defendant, J. M. Stevens, and thereupon upon consideration thereof,

IT IS ORDERED, ADJUDGED AND DECREED, That the said Bill of Complaint herein be and the same is hereby dismissed with costs to the defendants to be taxed, to all of which the complainants except and exceptions are allowed.

Dated March 30, 1922.

FRANK S. DIETRICH,
*Judge U. S. District Court,
District of Idaho, Eastern
Division.*

Endorsed: Filed, March 30, 1922,
W. D. McREYNOLDS, Clerk,

(Title of Court and Cause.)
No. 307.

PETITION FOR APPEAL.

Comes now the Complainants above named and in support of their petition for appeal herein allege and state:

1.

That they are aggrieved by the judgment and decree of this Court made and entered in this cause on the 30th day of March, 1922, sustaining the motions of defendant, J. M. Stevens, R. E. Roser and the Mascot Mining & Milling Company, Ltd. of Idaho, a corporation, to dismiss the Complainants'

Complaint in Equity, and dismissing said complainant's complaint and rendering judgment and decree for the costs of this action against the complainants.

2

These complaints conceive themselves aggrieved by said judgments, orders and decrees and also by the findings, orders, judgments, and decrees hereinafter set forth in the assignments of error, and which said assignments are filed herewith.

3.

That by reason of being aggrieved by said orders, judgments and decrees above referred to these complainants do hereby appeal from said orders, judgments and decrees to the United States Circuit Court of Appeals for the Ninth Circuit and on account of the reasons specified in the attached assignments of error hereinbefore referred to, and which are filed herewith.

WHEREFORE, these complainants pray that the Court grant an order allowing this appeal and causing a citation to be issued thereon and fixing the amount of the complainants appeal bond and ordering a stay of execution of all further proceedings pending said appeal.

HOMER N. BOARDMAN,
RICHARD H. JOHNSON and
CAREY H. NIXON,

Attorneys and Solicitors for Complainants.

Endorsed: Filed March 31, 1922,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

No. 307.

ASSIGNMENTS OF ERROR.

Come now the complainants named in the above entitled cause, and aver that the order of this Court made and entered in this cause on the 10th day of October, 1921, sustaining the motions of the defendants, J. M. Stevens and the Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, to dismiss the complainants' complaint in equity, and dismissing said complaint and rendering judgment and decree on March 30th, 1922, for the costs of this action, against the complainants, is erroneous and against the just rights of these complainants for the following reasons, to-wit:

1.

That the Court erred in sustaining the motion of the defendant, J. M. Stevens to dismiss the complainants' complaint in equity filed in this action.

2

That the Court erred in sustaining the motion of the defendant, Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, to dismiss the complainant's complain in equity filed in this action.

3.

That the Court erred in granting a final judgment and decree dismissing the complainants' complaint in equity and rendering judgment for costs against the complainants.

4.

That the Court erred in holding that the com-

plainants' complaint in equity did not state a cause of action.

5.

That the Court erred in holding and adjudging that the complainants' complaint in equity should be dismissed for want of equity.

6.

That the Court erred in holding that these complainants do not have a legal capacity to sue and prosecute this action.

7.

That the Court erred in holding that it has no jurisdiction over this action and the subject matter thereof.

8.

That the Court erred in holding that there is a misjoinder of parties in this action.

9.

That the Court erred in holding that the complainants' complaint in equity did not state a cause of action against the defendant, J. M. Stevens.

10.

That the Court erred in holding that the complainants' complaint in equity did not state a cause of action against the defendant, Mascot Mining & Milling Company, Ltd., of Idaho, a corporation.

WHEREFORE, the complainants pray that the judgment and decree of this Court made and entered on the 30th day of March, 1922, sustaining the motions of the defendant, J. M. Stevens and Mascot Mining & Milling Company, Ltd., of Idaho,

a corporation, to dismiss the Complainants' Complaint in Equity, and dismissing the same and rendering judgment and decree for costs of this action against the complainants, be reversed, vacated, set aside and held for naught.

Complainants further pray that upon reversing of the said judgment, order and decree of said Court, that this Court make such other and further orders and grant the complainants herein such other and further equitable relief to which they may be entitled in the premises.

HOMER N. BOARDMAN,
RICHARD H. JOHNSON and
CAREY H. NIXON,

Attorneys and Solicitors for Complainants.

Endorsed: Filed March 31, 1922,

W. D. McREYNOLDS, Clerk,

(Title of Court and Cause.)
No. 307.

ORDER ALLOWING APPEAL.

This day came the complainants above named by Messrs. Homer N. Boardman, Richard H. Johnson, and Carey H. Nixon, their attorneys and solicitors, and presented their petition for appeal, and their assignment of errors, and upon consideration thereof,

IT IS NOW ORDERED AND ADJUDGED, that said petition and assignment of errors be and the same are hereby filed and the petition for appeal be and the same is hereby allowed, as prayed, and citation is hereby directed to be issued as pro-

vided by law and bond on appeal is fixed at the sum of Five Hundred (\$500.00) Dollars.

FRANK S. DIETRICH,
*Judge of the U. S. District
Court, District of Idaho,
Eastern Division.*

Endorsed: Filed March 31, 1922,

W. D. McREYNOLDS, Clerk.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That we, Henry Kamp, Henry E. Hanstein and William Klein, as Principals and The United States Fidelity & Guaranty Company, as Surety, are held and firmly bound unto Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, and J. M. Stevens, in the full and just sum of FIVE HUNDRED & NO/100 (\$500.00) DOLLARS, to be paid to the said Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, and J. M. Stevens, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this 31st day of March in the year of our Lord one thousand nine hundred twenty-two.

WHEREAS, lately at the February term of the District Court of the United States for the District of Idaho, Eastern Division, in a suit depending in said Court between William Klein et al., complain-

ants, and Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, J. M. Stevens, and others, are defendants, judgment was rendered against the said complainants and the said complainants have obtained an appeal of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Mascot Mining & Milling Company, Ltd., of Idaho, a corporation and J. M. Stevens, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said complainants shall prosecute said appeal to effect, and answer all damages and costs if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

HENRY KAMP, (Seal)

HENRY E. HANSTEIN, (Seal)

WM. KLEIN, (Seal)

Principals.

UNITED STATES FIDELITY &
GUARANTY COMPANY, of Baltimore, Maryland.

By Henry Whitson,

*Attorney-in-Fact,
Surety.*

(Corporate Seal)

Approved by Frank S. Dietrich,
Judge United States District
Court, District of Idaho.

Endorsed: Filed March 31, 1922.

W. D. McREYNOLDS, Clerk,

(Title of Court and Cause.)

No. 307.

PRAECIPE FOR TRANSCRIPT.

TO THE CLERK OF THE UNITED STATES
DISTRICT COURT, DISTRICT OF IDAHO,
EASTERN DIVISION:

You are hereby requested to prepare at once the transcript for an appeal in the above entitled cause, and include therein the following:

1.

The citation dated March 31, 1922, with acknowledgment on proof of service.

2

The complainants' complaint in equity.

3.

The motion of the defendant, J. M. Stevens, to strike the complaint filed in this action by the complainants.

4.

The motion of the defendant, Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, to strike and dismiss the complaint filed in this case by the complainants.

5.

The minute entry and journal of the proceedings of this case on October 10, 1921, showing the pre-

sentation of the motion to dismiss and the decision of the Court, dismissing the case, with exception allowed to the complainants.

6.

Final decree entered March 30, 1922.

7.

Complainants' Petition for Appeal.

8.

Complainants' Assignment of Error.

9.

Order allowing appeal.

10.

Complainants' appeal bond with approval and all endorsements.

11.

Praecipe for transcript, with acceptance or proof of service and all endorsements, and return of record.

12.

Appellants' election to have transcript of record prepared under the supervision of the clerk of the District Court.

13.

Any and all orders which may hereafter be entered, enlarging the time to lodge the record in Appellate Court.

14.

Final certificate of the Clerk of the United States District Court.

RICHARD H. JOHNSON,
CAREY H. NIXON,
HOMER N. BOARDMAN,

Attorneys and Solicitors for Appellants.

State of Idaho,)
)ss.
County of Bannock.)

We, the undersigned, Douglas D. Mote ,Attorney and Solicitor of record for the appellee, J. M. Stevens, and P. C. O'Malley, Attorney and Solicitor of record for the appellee, Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, do hereby accept service of the above and foregoing Praecipe for Transcript, and acknowledge receipt of a true copy thereof at Pocatello, Idaho.

This 2nd day of May, A. D. 1922.

D. D. MOTE,

*Attorney and Solicitor for
J. M. Stevens, Appellee.*

P. C. O'MALLEY,

*Attorney and Solicitor for
Mascot Mining & Milling
Co., Ltd., of Idaho, a
Corporation, Appellee.*

Endorsed: Filed May 3, 1922,

W. D. McREYNOLDS, Clerk,

By Pearl E. Zanger, Deputy.

*In the District Court of the United States, for the
District of Idaho, Eastern Division.*

ORIGINAL CITATION.

No. 307.

William Klein, John Picha, Fred Kamp,
William F. Kamp, Henry Kamp, Henry
E. Hanstein, Albert E. Will, M. J. Dall-
meyer, A. J. Dallmeyer, F. J. Tullius,
Henry Walsh, Mattie McLennan, W. J.
Weiche, and — —Weiche, his wife; John

Hetzel, Frank Manning, Frank P. Zurline, Louis Thieme, Rudolph Schier, John W. Wolf, Roy C. Wolf, Fanny M. Wolf, George H. Reding, William Graef, Albert Coleman, J. H. Pruitt, Paul Brueschke, H. Eden, Mrs. Henry Schwarze, Henry C. Kamp and Margarethe Kamp, his wife; Ernest Kamp, Elsie Kamp, W. A. Burtchi, W. J. Burtchi, David Scheihing, John Swirzinski, Mrs. W. Winstanley, T. F. Hansen, Anna Hansen, Mrs. A. Murray, G. W. Burmeister, Frank Vorpahl, George Schwab, H. W. P. Wolf, Joel Sprunger, Martha Sprunger, Omer Sprunger, Elda Sprunger, Albert Sprunger, Irene Sprunger, A. G. Messall, Henry Knippelmeier, Peter Wolf, Nicholas Reding, William Sieber, Caroline Sieber, Albert Moeller, Joseph Vondran, H. H. Carter, C. Arnold, Theodore Von Elm, Michael Reding, E. C. Wolf, Henry C. Wolf, L. Eden, Mrs. A. H. Wolf, J. W. Pickard, John Bolton, Mrs. A. D. Frascoli, William Borchers, John Thiessen, F. Schaefernolte, August Bliefernich, William Berger, John Keller, Jack Keller, Fred Schielow, A. A. Knoch, C. Keller, A. C. Boekle, E. R. Alpert, Frank H. Knoche, J. W. Knoche, Fred Homrighausen, Paul Alpert, Arthur E. Ninmann, H. E. Palmer, William Heusmann, Mrs. T. J. Rasp, J. W. Lorenzen, Frank Dale, J. C. Goggerty, Mrs. George Loeffelholz, Dan Schader, Jacob Rott, F. M. Mozer, John Hummel, Herman Mielke and H. Kappus, John Lorenzen, Robert G. Koerner, Elizabeth Kastner,

G. L. Knoche, M. H. Seldelbach and
William Fedderson,

Complainants,

vs.

Charles Peter, J. M. Stevens, A. J. Weber,
Arthur H. Freber, W. R. Calvert, Frank
Van der Linde, William Jacobsen, R. E.
Roser, Ferdinand Walther and the
Mascot Mining & Milling Company,
Ltd., of Idaho, a corporation,

Defendants.

The President of the United States to the above named defendants, the Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, and J. M. Stevens. and all others similarly situated; and to P. C. O'Malley, Esq., and Douglas D. Mote, Esq., their attorneys respectively, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be held in the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an appeal allowed and on file in the Clerk's office of the District Court of the United States for the District of Idaho, Eastern Division, wherein, William Klein, John Picha, Fred Kamp, William F. Kamp, Henry Kamp, Henry E. Hanstein, Albert E. Will, M. J. Dallmeyer, A. J. Dallmeyer, F. J. Tuilius, Henry Walsh, Mattie McLennan, W. J. Weiche and — — Weiche, his wife, John Hetzel, Frank Manning, Frank P. Zurline, Louie Thieme, Rudolph Schier, John W. Wolf, Roy C. Wolf, Fanny M. Wolf,

George H. Reding, William Graefe, Albert Coleman, J. H. Pruitt, Paul Brueschke, H. Eden, Mrs. Henry Schwarze, Henry C. Kamp and Margarethe Kamp, his wife; Ernest Kamp, Elsie Kamp, W. A. Burtchi, W. J. Burtchi, David Scheihing, John Swirzinski, Mrs. W. Winstanley, T. F. Hansen, Anna Hansen, Mrs. A. Murray, G. W. Burmeister, Frank Vorpahl, George Schwab, H. W. P. Wolf, Joel Sprunger, Martha Sprunger, Omer Sprunger, Alda Sprunger, Albert Sprunger, Irene Sprunger, A. G. Messall, Henry Knippelmeier, Peter Wolf, Nicholas Reding, William Sieber, Caroline Sieber, Albert Moeller, Joseph Vondran, H. H. Carter, C. Arnold, Theodore Von Elm, Michael Reding, E. C. Wolf, Henry C. Wolf, L. Eden, Mrs. A. H. Wolf, J. W. Pickard, John Bolton, Mrs. A. D. Frascoli, William Borchers, John Thiessen, F. Schaefermolte, August Bliefernich, William Berger, John Keller, Jack Keller, Fred Schielow, A. A. Knoch, C. Keller, A. C. Boekle, E. R. Alpert, Frank H. Knoche, J. W. Knoche, Fred Homrighausen, Paul Alpert, Arthur E. Ninman, H. E. Palmer, William Heusmann, Mrs. T. J. Rasp, J. W. Lorenzen, Frank Dale, J. C. Gogerty, Mrs. George Loeffelholz, Dan Schader, Jacob Rott, F. M. Mozer, John Hummel, Herman Mielke and H. Kappus, John Lorenzen, Robert G. Koerner, Elizabeth Kastner, G. L. Knoche, M. H. Seldelbach and William Fedderson, are complainants and appellants, and the Mascot Mining & Milling Company, Ltd., of Idaho, a corporation, and J. M.

tion as attorneys for the defendants, and by handing to and leaving a true and correct copy thereof with D. D. Mote and P. C. O'Malley personally at Pocatello, Idaho, in said District on the 8th day of April, A. D. 1922.

FRANK M. BRESHEARS,
U. S. Marshal.
By G. W. Sutherland,
Deputy.

7—279

Endorsed: Filed April 10, 1922,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 96, inclusive, contains true and correct copies of that portion of the pleadings and proceedings in the above entitled cause as requested by the praecipe filed herein, and that the same constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record

herein amounts to the sum of \$130.95, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court, affixed at Boise, Idaho, this 20th day of May, 1922.

W. D. McREYNOLDS,

Clerk.

(SEAL)

By Pearl E. Zanger,

Deputy Clerk.

No. 3877

2

United States Circuit Court of Appeals
NINTH CIRCUIT

WILLIAM KLEIN, ET AL.,

Appellants,

VS.

CHARLES PETER, ET AL.,

Appellees.

Appeal from the District Court of the United States for
the District of Idaho, Eastern Division.

BRIEF AND ARGUMENT OF APPELLEES.

J. M. STEVENS,

Pocatello, Idaho

D. D. MOTE,

Pocatello, Idaho

Solicitors for Appellees.

FILED

OCT 13. 1922

F. D. MONCKTON,
CLERK.

No. 3877

United States Circuit Court of Appeals

NINTH CIRCUIT

WILLIAM KLEIN, ET AL.,

Appellants,

VS.

CHARLES PETER, ET AL.,

Appellees.

Appeal from the District Court of the United States for
the District of Idaho, Eastern Division.

BRIEF AND ARGUMENT OF APPELLEES.

STATEMENT OF THE CASE.

The solicitors appearing here for the Appellees represented only two defendants in the lower court, namely: The Mascot Mining and Milling Company, Limited, of Idaho, and the defendant, J. M. Stevens.

In this action brought originally in the United States District Court, District of Idaho, Eastern Division, the defendants Mascot Mining and Milling Company, Limited, of Idaho, and J. M. Stevens and R. E. Roser were

served with process, but service of subpoena was not made on any of the other defendants named in said cause. (No return of the service of subpoena is contained in the transcript of the record). This case was filed on June 24th, 1921, at a time when a similar case, numbered 263, with the same complainants and the same defendants was pending in the same court. The present case in the United States District Court for the District of Idaho was numbered 307, and the copy of the complaint filed in this case is the same as the complaint filed in 263, and in which there is no material change or additional allegations. The defendants, the Mascot Mining and Milling Co., Ltd., of Idaho, and the defendant, J. M. Stevens filed their motion to strike and to dismiss the bill of complaint. The motion on behalf of the Mascot Mining and Milling Company (See transcript, Pages 74-77) charged an insufficiency of fact to constitute a cause of action against this particular defendant as well as the fact that under the State court action, the District Court of the Fifth Judicial District of the State of Idaho, Bannock County, had entertained a suit against the Mascot Mining and Milling Company, Limited, and that out of that action a receiver had been appointed. That the receiver had taken possession of all of the property, both real and personal, belonging to the Mascot Mining and Milling Company, Limited, and which receiver was in possession of said Mascot Mining and Milling Company, Limited, of Idaho, at the time suit No. 307, in equity was filed. For the further reason that case No. 307 in equity was to all intents and purposes and in substance, the same as case No. 263 in equity.

The motion on behalf of J. M. Stevens to strike plaintiffs complaint (see transcript pages 77-80) was that the complaint had not been brought in good faith; that a receiver had been appointed by the state court as affirmatively shown in complainants bill of complaint, and the state court had taken exclusive possession of the defendant corporation the Mascot Mining and Milling Company, Limited, of Idaho. Also that the complainants did not have legal capacity to sue on account of the defendant corporation, the Mascot Mining and Milling Company, Limited, of Idaho, having been placed in the hands of a receiver and this receiver being in charge at the time this action was brought, and that he was the only party that could maintain a suit against the directors or against the corporation. Also that no demand had been made or any request had been made upon the receiver of the State court to institute any action similar to this one stated in the bill of complaint. Also for the further reason that the Federal Court had no jurisdiction because of the prior jurisdiction in the state court.

The motions on behalf of the Mascot Mining and Milling Co., Ltd., and on behalf of J. M. Stevens, were argued and submitted to the court at same time and thereafter the court's order was to the effect that complaint in equity No. 307 should be and was dismissed. (See transcript p. 80-81). At the time the trial court sustained the motions of the defendants, the Mascot Mining and Milling Company, Limited, of Idaho, and J. M. Stevens, no application was made to the court for permission to

amend or to file a supplementary complaint asking leave to make the receiver a party either as complainant or as a defendant. That while the complainants knew that the receiver had been appointed in the state court action, yet there was no application to the state court for an order directing the receiver to bring such a suit as stated in appellants' bill of complaint, nor was there any request by complainants or complainants' attorneys of the receiver that he institute an action such as stated in complainants bill. And it does not appear in complainants bill of complaint in equity No. 307 that such a request was ever made of the receiver, nor does it plead any fact by which the court could understand that the receiver had refused or declined to bring any such action. Nor does it appear that the District Court of the Fifth Judicial District of the State of Idaho, in and for Bannock County, ever refused to the complainants an order directing the receiver to bring such a suit. The bill of complaint nowhere attempts in this instance to plead facts which would excuse the complainants from a strict compliance with equity rule 27 of this court.

The trial court, after considering the arguments on the motions made by the defendants, the Mascot Mining and Milling Co., Ltd., and J. M. Stevens dismissed said action on Oct. 10, 1921, allowing exceptions to such order, and on March 30, 1922, the court entered a final decree dismissing complainants bill No. 307 in equity. (See transcript pages 80-81).

The bill of complaint does not show a compliance with

equity rule 27 in requesting or demanding action by the board of directors of defendant corporation.

In the transcript of the record on page 64 it shows that one G. Adolf Lobner intervened in the state court action where Ferdinand Walther was plaintiff and the Mascot Mining and Milling Company, a corporation, was defendant, in which action E. S. Sloane was appointed receiver. The complaint in intervention in that case was in substance and fact identical to bill of complaint No. 307 in equity filed in the United States District Court for the District of Idaho, and the attorneys representing the complainants in equity case No. 307 were the same attorneys who appeared in the state court on behalf of G. Adolf Lobner, intervenor. On page 65 of the transcript Ross W. Bates appeared in the state court action and on behalf of the intervenor in that action moved to dismiss the complaint in intervention. There is, however, an error on page 65 of the transcript wherein it reads that Ross W. Bates moved to dismiss the complaint in intervention filed by the receiver. The word "receiver" in this instance should be read as intervenor.

This brief and argument is presented on behalf of the defendants, the Mascot Mining and Milling Company Limited, and on behalf of the defendant, J. M. Stevens:

BRIEF AND ARGUMENT

The principal question involved in the hearing before this court is whether or not the complainants' bill in equity No. 307, stated facts sufficient to constitute a

cause of action in favor of the complainants either at law or in equity. Also the question whether the complainants had legal capacity to sue as they did in equity case No. 307.

In the appellants' brief much is said as to equity rule 27 and its application to the present case before this court. It would serve no useful purpose to set out equity rule 27 in its entirety, but the substance of that rule is that where the directors of a corporation are guilty of mismanagement or do any act which is contrary or against the interests of the corporation, that the stockholders may proceed by a suit where the appeal to the directors would be unavailing. In pleading a case under equity rule 27, it is incumbent upon the complainants to show that they have either demanded or requested officers in charge of the corporation to desist from causing injury to the corporation or that facts must be pleaded which show an excuse for not complying with the strict letter of this equity rule. It will be remembered in this case that prior to the time equity case No. 307 was filed by the complainants, a suit had been instituted in the state court in Idaho in which one of the directors brought suit to recover money due to him from the corporation, and in that case on his application a receiver was appointed by the state court, and which receiver took charge of all of the assets being the real and personal property belonging to the Mascot Mining and Milling Company, Limited, of Idaho, as well as all books and records, office furniture and fixtures, and of the office of said defendant company. That upon the re-

ceiver so appointed qualifying and taking charge of the business of the Mascot Mining and Milling Company, Limited, of Idaho, the officers and directors were displaced from any authority or any control whatsoever over the business or affairs of said defendant company, and from the appointment of the receiver he alone, under the direction of said court appointing him, had, subject to the order of that court, the full control of the defendant corporation.

Counsel for the appellant in the brief filed on behalf of the appellants pays little or no attention to the fact that a receiver had been appointed by the state court, and apparently assumes that there is no distinction or difference between cases wherein the corporation is in the hands of a receiver, and cases wherein the corporation is managed, directed and controlled by its own officers, but there is a vast distinction in these cases. Where the corporation is directed by its officers, and they refuse to take any action to redress any wrongs done to the corporation, or where they refuse to change the policy of the corporation where the same is being mismanaged, the stockholder is entitled to go into court under equity rule 27 and present the facts to the court, and if he has plead facts which entitles him to maintain his action under equity rule 27, the court will render assistance, and even in this connection he must show a compliance with equity rule 27 or plead facts under which he established excuses, but where there is a receiver appointed by a court of competent jurisdiction the situation is altogether changed. In bill of complaint

No. 307, the complainants do not charge any fraud on behalf of the state court in the appointing of a receiver to take charge of the defendant corporation, the Mascot Mining and Milling Company, Limited, of Idaho, and in the absence of an allegation the receiver is presumed to be impartial, that he is anxious and desirous as an officer of the court to enforce all of the rights of the corporation, to manage and control the same and to bring such actions as are necessary for the good of the corporation. He is an officer of the court and his act as receiver must, under the laws of Idaho, be approved and be acceptable to the court. If it should be determined that a receiver has been appointed through fraud or that he has been appointed at the instance of directors who are seeking the destruction of the corporation, then it is the duty of whomsoever is grieved by such action, and if he be a stockholder he may go into the court responsible for the appointment of such receiver and ask his removal. If he is satisfied that fraud existed by which the receiver came into being he must act promptly, and also he may go into the same court and get his order from the court requiring the receiver to bring an action on behalf of the corporation. The complainants in this case knew of the state court's action and knew that they were welcome at any time to intervene in that action and one G. Adolf Lobner who claimed to be a stockholder of that defendant company, intervened and filed in that court a complaint in intervention similar to the one being considered, and being represented by the same counsel who appear for the appellants

in this case. No reason is shown why the complainants here, after the dismissal of equity case No. 263 and prior to the filing of equity case No. 307, did not go into the state court and ask leave to intervene or ask leave to set aside the state court receiver, and without asking leave of the state court for an order requiring the receiver to bring an action there on behalf of the corporation and its stockholders. What would have been done upon such a request cannot here be said nor can it be assumed that the state court was or is a party to any alleged fraud or that the state court would have sanctioned the receivership proceedings if it had known of any fraud in the matter, or that it would have denied to the complainants an order to the receiver to bring such suit. Again, too, it cannot be said that the state court was being directed, influenced or controlled by the defendants, or any of them, and no showing is made at all in the complaint why the complainants did not seek an order of the court requiring the receiver to sue or why the complainants did not request the receiver to bring such action. Under the order of the state court appointing the receiver, its receivership was not one qualified or limited but it was a general receivership under which he took possession of the Mascot Mining and Milling Company, Limited, of Idaho, and that upon judgment in that case the court so appointing him directed that he, as receiver, sell the property of the defendant corporation. As has been said before, the proper place to question the legality of the claims of Peter and the claims of Walther submitted to the state

court was in that particular court. The appellants had every opportunity in that case to litigate all of the questions involved in the present case and they were advised and knew of the pendency of that case, and it is the contention of the appellees herein that having failed to go in and contest any matter in the state court proceeding they cannot now go into the Federal Court as they have done and ask the Federal Court to set aside and vacate orders of the state court. And that the complainants are unable at this time to set aside the action of the state court in the appointment of the receiver and that the federal court is unable to make any order to oust the receiver of the state court action. The further contention as first expressed is that the state court receiver was the only party who could have instituted an action on behalf of the corporation such as the stockholders have attempted to do in this proceeding, and that having failed to request the state court for an order directing receiver to institute such action and having failed to make the demand upon the receiver to bring such action that they, as stockholders, have not come within the spirit of equity rule 27, in the bringing of such action.

At the time of the presentation of the defendants motions to dismiss, the court advised the attorneys representing the complainants that they should either have the receiver bring such action or show facts by way of pleading why the receiver would not bring the action in the place of the stockholders, but notwithstanding the court's suggestion equity case No. 263 was dismissed and equity case No. 307, which is for all intents and pur-

poses the same complaint as was filed in equity case 263, they made no attempt whatsoever to plead that the consent of the court or the consent of the receiver could not be had in bringing such action.

With the foregoing statements, it is desired to call the court's attention to some of the cases cited by the appellants in their brief now presented to the court. Much stress is laid in the opening of their brief on equity rule 27. We have no quarrel to find with the provisions of equity rule 27, or a case brought under such rule when the facts as plead bring the parties within the letter or spirit of said rule.

In the case of Ogden et al, vs. The Gild Edge Consolidated Mines Company, et al, 225 Federal, 723, cited in appellants brief was a case wherein a difficulty existed between the creditors and the directors of the corporation but nowhere in that case do the facts follow the facts in this action. No receiver had been appointed and the directors were still in charge of the corporation. The appellees contend that the cases are entirely dissimilar and that the rule of law applicable in the case of Ogden vs. The Gilt Edge Consolidated Mines Company, et al, is not applicable to the case before this court.

Without further comment upon each case individually cited and noted in appellants brief, a general statement may be made which in substance and fact will show that the cases are not similar to the case herein in question, but all of those cases comment upon the fact of disputes and differences between directors and stockholders with-

out the added element of a receivership. These cases too lay down the rule that where the complainants bring themselves within equity rule 27, they are entitled to proceed, but from the facts pleaded by the complainants and from facts as shown by the appellants' transcript of the record they have neither complied with equity rule 27 or plead facts which in the instant case would relieve them from so doing.

The relief asked for by the complainants in this case if recovered would be the assets of the defendant corporation and therefore a legal right. This being property of the corporation it would come into the hands of the receiver and would be such property as the receiver himself would be entitled to take into his possession.

In Tardy's Smith on Receivers, volume 1, article 2, page 5, a statement is given as to the office of the receiver, and that statement is as follows:

"A receiver is a person appointed by the court as its representative, for the purpose of taking into his control, custody and management property which is the subject matter of or involved in litigation for the purpose of preserving it pending the ultimate determination of such litigation, when it appears to the court to be unreasonable that it should remain in possession of the litigants. He is regarded as an officer of the court appointing him and whatever he does under the orders of the court in respect to the property over which he is appointed receiver is the act of the court itself. His custody is that of the court and he can not act, save as he is directed by the court. He is very frequently characterized as the arm or hand of the court. Being an officer of the court and exercising his functions for the benefit of all the parties concerned

in the litigation, he is not to be regarded as an agent of either the plaintiff or defendant. He acts for the common benefit of all parties interested in the litigation. In view of his duties towards all parties to the litigation, he naturally should be a person who is impartial as between the litigants and parties interested in the outcome of the controversy. A receiver has also been characterized as a quasi trustee holding the fund for the benefit of whoever may eventually establish title to it."

The thought expressed in the above statement was approved by the Circuit Court of Appeals for the Eighth Circuit in the case of *Ridge vs. Manker, et al.*, 132 Federal, 599, decided by that court on September 5th, 1904. On page 601, in the opinion of that court the court states:

"A receiver is an officer of the court appointing him. He is its immediate representative in the custody and administration of the property of which it has taken possession. His custody is the custody of the court. A suit against him is a suit against the receivership; and, except as authorized by statute, if instituted without permission of the court, is an unwarranted interference with the exercise of its exclusive jurisdiction. A court having lawfully acquired the possession of property through the appointment of a receiver may reserve to itself the determination of all questions affecting it and pertinent to the proper administration thereof, or it may permit such questions to be judicially settled in other tribunals. Passing the statutory exceptions, no suit can be elsewhere maintained against the receiver without the permission of the court from which he derives his authority. *Davis v. Gray*, 16 Wall, 203, 217, 21 L. Ed. 447; *Barton v. Barbour*, 104 U. S. 126, 26 L. Ed. 672; *McNulta v. Lockridge*, 141 U. S. 327, 332, 12 Sup. Ct. 11, 35 L. Ed. 796:

Texas & Pac. Rail. Co. v. Cox, 145 U. S. 593; 12 Sup. Ct. 905, 36 L. Ed. 815; *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008, 37 L. Ed. 815; *Farmers Loan & Trust Co. v. Railroad Co.*, 177 U. S. 51, 61, 20 Sup. Ct. 564, 44 L. Ed. 667."

The Supreme Court of the State of Idaho in the case of *Martin vs. Atchison*, 2 Idaho 634, 33 Pac. 47, held that a receiver was an officer of the court, under the court's protection, and property coming into his hands as a receiver was in custodia legis and that no one could sue him without leave of the court responsible for his appointment.

In the case of *McTamany vs. Day, et al*, a case decided by the Supreme Court of the State of Idaho, 1912, and found in 128 Pac. 563, the plaintiff had brought an action as a creditor of an insolvent bank. At the time of bringing suit the bank was in the hands of a receiver. The suit by the plaintiff was brought against the directors of the bank to recover an indebtedness due from the bank to the plaintiff. The complaint alleged wrongful and fraudulent acts on the part of the directors. Demurrers were filed to the effect that it was the office or duty of the receiver in charge of said bank to prosecute a cause of action against the directors of the bank if there existed in favor of the creditors or the receiver any action for neglect or fraud and that it was the duty of the receiver, if a cause of action existed, to recover such money or assets of the bank for the benefit of creditors. In disposing of this question the Supreme Court of the State of Idaho on page 565 says:

"The Wallace State Bank is in the hands of a

receiver, and he is authorized to proceed and marshal and collect all of the assets of the bank, and distribute them pro rata among the creditors or as the court may direct. In *Crandal v. Lincoln*, 52 Conn. 73 action was in the receiver saying: 'To allow creditors to bring suits in such cases, unless possibly under peculiar circumstances, if practicable, would be highly inconvenient and contrary to the policy and spirit of the statute.' It is stated in the recent work of Tiffany on Banks and Banking, page 304 et seq., as follows: 'The officers being liable to the corporation for losses caused by their fraud, gross negligence, or wilful breach of duty, this liability may be enforced by or for the benefit of the creditors when the corporation becomes insolvent.' . . . It follows that the remedy of creditor is not by an action at law against the guilty officers. (Citing many authorities). . . Of course, where the corporation is in the hands of a receiver, or assignee, as the representative of all concerned, he is the proper party to maintain an action."

"If the bank has suffered loss on account of the directors having declared dividends contrary to the provisions of section 2981 Rev. Codes, or has suffered loss in consequence of the directors' fraud, gross negligence or wilful breach of duty, after such corporation is placed in the hands of a receiver, it is the duty of the receiver, as the representative of all concerned, to proceed and collect such illegal dividends and all other claims of such corporation due said bank by contract or caused by the fraud, gross negligence, or wilful breach of duty of the officers thereof, so that whatever may be recovered may be properly distributed among all of the creditors of the bank as the law or court may direct. See Tiffany on Banks and Banking, page 304, et seq."

The Supreme Court of Idaho in further comment on this case, on page 565 stated that:

"If the receiver fails or refuses to do his duty

in this regard, that matter ought to be called to the attention of the court, and the court ought to compel him to do so or remove him. The trial court did not err in sustaining said demurrers and entering judgment of dismissal."

In case of *Kelly v. Dolar, et al.*, 233 F. 635, decided by the Circuit Court of Appeals, Third Circuit, May 22nd, 1916, there was presented to that Court a case involving a stockholder's suit. The Bill of Complaint was filed in the United States District Court for the Eastern District of Pennsylvania, against certain directors of a corporation for which a receiver had been appointed by a New York State Court. It charged the defendants with failure to require the lessee to perform covenants of a lease, as well as a failure to have the lease renewed, in consequence of which the same was subsequently foreclosed, and that they had failed to require the payment of certain taxes. In discussing this case the Court said:

"To our mind, three principal questions arise on this appeal: First, has the plaintiff shown his right to maintain this bill? Second, is the Pennsylvania Statute of Limitations a bar to his recovery? And, Third, is the action barred by laches? An answer adverse to the plaintiff on any one of these questions justifies an affirmance of the decree entered below."

In discussing the first of these questions presented the Court further said:

"Turning to the first question, it is clear that the gravamen of the plaintiff's complaint is the negligence of the three defendant directors. That the negligence of a director is an injury to his corpora-

tion, and that the right to recover for such negligence is a legal as contrasted with an equitable right, and that the corporation is vested with the right to recover for such injury, is established by authority. In some cases the right is asserted in equity; in some, at law, according to circumstances; but in whatever form it is litigated the right to recover for negligence is a legal right. *Loan Society vs. Eavenson*, 241 Pa. 65, 88 Atl. 295; *National Bank vs. Wade* (C. C.) 84 Fed. 10; *Cockrill vs. Cooper*, 86 Fed. 7, 29 C. C. A. 529; *Horn S. M. Co., vs. Ryan*, 42 Minn. 196, 44 N. W. 56; *Emerson vs. Gaither*, 103 Md. 564, 64 Atl. 26, 8 L. R. A. (N. S.) 738, 7 Ann. Cas. 1114."

"In this case, under the general principles of receiverships, and specifically by virtue of sections 232 and 239 of the General Corporation Law of New York, as amended by chapter 766 of the Laws of 1913, viz.:

'Sec. 232. Such receivers shall, from time of their having filed the security required by law, be vested with all the property, real or personal, vested or contingent, of the corporation.'

'Sec. 239. General Powers of Receivers. The said receivers shall have power: (1) To sue in their own names or otherwise, and recover all the property, debts and things in action, belonging or due or to become due to such corporation, whether accruing or maturing before or after the dissolution thereof, and whether vested or contingent at the time of such dissolution, in the same manner and with the like effect as such corporation might or could have done if no receivers had been appointed.'

—this legal right of action against the directors for negligence was vested in the receiver on his appointment. Such being the case, the corporation originally, and the receiver on his appointment, being possessed of such legal right, and of the right to sue for its redress, how has this right been vested in

the plaintiff so as to enable him to maintain this action? Manifestly, he could not maintain a suit at law to assert a legal right vested in the receiver. If so, what gives him a right to resort to equity?

“Of course, where a corporation, through the fraud of those controlling it, refuses to bring suit against a director and redress a wrong, this calls into being an equitable right which equity will enforce on a stockholder’s bill. *Foss vs. Harbottle*, 2 Hare 461. But, as said in that case:

‘It was not, nor could it be successfully argued, that it was a matter of course for any individual members of a corporation thus to assume to themselves the right of suing in the name of the corporation. In law, the corporation, and the aggregate members of the corporation, are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which *prima facie* would require that the corporation should sue in its own name and in its corporate character, or in the name of some one whom the law has appointed to be its representative.’

“No such state of facts here exists. The Central Company is not under the domination of its directors; there is no allegation of *mala fide* control on their part. On the contrary, the corporation has passed from their control into that of a court of competent jurisdiction, and that Court has on application declined to allow the receiver of such company to bring suit against the directors. Such being the case, it is manifest that the right of action of the corporation still remains in the corporation and its receiver, and forms part of the estate which that court is administering. To the present situation we may apply the language of the Supreme Court in *Porter vs. Sabin*, 149 U. S. 480, 13 Sup. Ct. 1008. 37 L. Ed. 815, namely:

‘The right of action remains part of the estate of the corporation within the exclusive custody

and jurisdiction of the state court.'

'It is contended, however, that such court, while refusing to allow the receiver to sue, granted leave to the plaintiff stockholder to sue. But leave to sue went no further than permission to sue, and no order was made, even if such a thing were possible, purporting to assign to the stockholder the claim vested in the receiver, or to confer on the stockholder a right to enforce the legal right vested in the receiver.

'Such being the facts, the gist of the present controversy is: First, whether the plaintiff is vested with the legal right which he is attempting to enforce; and, second, if he is not vested with such legal right, has he shown such facts or circumstances as give him standing in a court of equity to enforce the legal right vested in the receiver? The answer to the first question is clear. The legal right, an action for damages for negligence is vested in the receiver. It has never been assigned to the plaintiff, and the law courts are open to the receiver to prosecute such claim. But the reasons which led the court to decline allowing its receiver to prosecute are that it is satisfied a suit at law was futile, because, it would be met by a complete defense. This appears in the answer to a petition praying for such direction, wherein the receiver said:

'I do not believe it is to be to the interest of the Central Park Co., or its stockholders that I maintain this action for several additional reasons, among them the fact, as I understand it, that if I were to maintain the action it would have to be one at law and more than 6 years have elapsed since either of the three gentlemen you mention ceased to be a director of the Central Park Company'

'Indeed, no such facts, as under the principle of *Foss vs. Harbottle*, 2 Hare 461, and *Hawes vs. Oakland*, 104 U. S. 455, 26 L. Ed. 827, lead a court of equity to entertain a stockholder's bill and thus enforce rights of his corporation which would other-

wise be lost, exist in the present instance. The simple fact is that the Court administering the affairs of the Central Company has declined to prosecute this claim by its receiver. Such being the case, it is quite clear that the Court, declining to have its receiver pursue a remedy open to it in a court of law, cannot, by allowing a stockholder to pursue such claim, call into exercise the powers of a court of equity whose exercise of jurisdiction in such cases is because the law is powerless to afford a remedy. It is manifest, therefore, that this stockholders' bill is without equitable foundation and the decree below is justified on that ground."

In the case of *Kelly vs. Dolan et. al.*, 218 Fed. 966, the United States District Court for the Eastern District of Pennsylvania in discussing the situation where a receiver has been appointed for a corporation said:

"Where a statutory receiver has been appointed for a corporation, neither the corporation, nor a stockholder, can maintain an action for alleged loss of the corporation's assets without the sanction of the Court appointing the receiver, but with such sanction a suit for the corporation's benefit may be brought in a foreign jurisdiction in which defendants can be served. (Syl. 5.)"

On page 968 of the opinion the Court gives the following:

"Were there no receivers in the case, this plaintiff might maintain his bill upon the averment of demand made upon the corporation and its refusal to sue, and that the refusal was fraudulent and due to the control exercised over the managers of the corporation by the defendants. As, however, the affairs of the corporation are in the hands of a receiver, certain consequences result from this. These consequences, or at least some of them, differ ac-

according to the character of the receivership. A chancery receiver is but the hand of the Court, which has taken over the administration of the affairs of the corporation. The corporation continues to be the owner of all that belongs to it. One effect of the interposition of the Court is to take from the corporation the control of its affairs. Another consequence is that it receives the protection of the Court against the interference of others. Within the jurisdiction of the Court appointing the receiver no action can be taken by the corporation or against it without the sanction of the Court. If anything is to be done by the corporation, it must be done through and by the receiver."

This case last cited was appealed to the Circuit Court of Appeals for the Third Circuit and was sustained by the Circuit Court. See *Kelly vs. Dolan et. al.*, 233 Fed. 635, 147 C. C. A. 443, set out at length herein.

In the case of *Porter vs. Sabin*, 149 U. S. 480, 13 Sup. Ct. 1008, 37 L. Ed. 815, a suit was brought, in equity, by plaintiffs as stockholders against the defendant, a former president of the corporation, and others, charging fraud on the part of the defendant, alleging the appointment of a receiver by a Court of the State of Minnesota, that the receiver had applied for an order to bring the action which was denied by the State Court, that the plaintiffs applied to the State Court for an order permitting the receiver to be made a party to the bill, that the Court denied the application as well as a further application then made by the plaintiffs to exclude from a contemplated order of sale then pending before it, the cause of action set out in the bill and all other actions which stockholders might maintain in right

of the corporation. It was alleged that the receivership proceedings were fraudulent. The defendants demurred to the bill for want of jurisdiction, because the State Court which appointed the receiver was the only Court having jurisdiction in the premises; for want of equity; because the receiver was a necessary party. In an opinion by Mr. Justice Gray, the Court says:

“The grounds on which they attempt to maintain this suit are that the court which appointed the receiver has denied his petition for authority to bring it, as well as an application of the plaintiffs for leave to make him a party to this bill.

“Their position rests on a misunderstanding of the nature of the office and duties of a receiver appointed by a court exercising chancery powers, and of the extent of the jurisdiction and authority of the court itself.

“In *Brinckerhoff vs. Bostwick*, 88 N. Y. 52, and *Ackerman vs. Halsey*, 10 Stewart (37 N. J. Eq.) 356. cited for the plaintiffs, in which stockholders of a national bank were permitted to bring such a suit when a receiver had refused to bring it, the receiver was not appointed by a judicial tribunal, but by the Comptroller of Currency, an executive officer.

“When a court exercising jurisdiction in equity appoints a receiver of all the property of a corporation, the Court assumes the administration of the estate; the possession of the receiver is the possession of the Court; and the Court itself holds and administers the estate, through the receiver as its officer, for the benefit of those whom the Court shall ultimately adjudge to be entitled to it. *Wisswall vs. Sampson*, 14 How. 52, 65; *Peale vs. Phipps*, 14 How. 368, 374; *Booth vs. Clark*, 17 How. 322, 331; *Union Bank vs. Kansas City Bank*, 136 U. S.

223; *Thompson vs. Phoenix Ins. Co.*, 136 U. S. 287, 297.

“It is for that Court, in its discretion, to decide whether it will determine for itself all claims of or against the receiver, or will allow them to be litigated elsewhere. It may direct claims in favor of the corporation to be sued on by the receiver in other tribunals, or may leave him to adjust and settle them without suit, as in its judgment may be most beneficial to those interested in the estate. Any claim against the receiver or the corporation, the Court may permit to be put in suit in another tribunal against the receiver or may reserve to itself the determination of; and no suit, unless expressly authorized by statute, can be brought against the receiver without the permission of the Court which appointed him. *Barton vs. Barbour*, 104 ^U S. 126; *Texas & Pacific Railway vs. Cox*, 145 U. S. 593, 601.

“The reasons are yet stronger for not allowing a suit against a receiver appointed by a State Court to be maintained, or the administration by that Court of the estate in the receiver’s hands to be interfered with, by a Court of the United States, deriving its authority from another government, though exercising jurisdiction over the same territory. The whole property of the corporation within the jurisdiction of the Court which appointed the receiver, including all its rights of action, except so far as already lawfully disposed of under orders of that Court, remains in its custody, to be administered and distributed by it. Until the administration of the estate has been completed and the receivership terminated, no Court of the one government can by collateral suit assume to deal with rights of property or action, constituting part of the estate within the exclusive jurisdiction and control of the Courts of the other. *Wiswall vs. Sampson*. *Peale vs. Phipps* and *Barton vs. Barbour*, above cited; *Williams vs. Benedict*, 8 How. 107; *Pulliam vs. Osborne*, 17 How. 471, 475; *People’s Bank vs.*

Calhoum, 102 U. S. 256; Heidritter vs. Elizabeth Oil Cloth Co., 112 U. S. 294; In re Tyler, ante, 164.

“The State Court, upon further hearing or information, may hereafter reconsider its former orders, so far as no rights have been lawfully vested under them, and may permit its receiver to sue or be sued upon any controverted claim. But should it prefer not to do so, the right of action of the corporation against its delinquent officers, like other property and rights of the corporation, will remain within the exclusive jurisdiction of that Court, so long as the receivership exists.”

Upon the law as expressed by the Courts to which reference is made in this brief, it is urged that the action of the United States District Court for the District of Idaho in dismissing the bill of complaint upon the motions presented by the appellees, The Mascot Mining and Milling Company, Limited, of Idaho, and the appellee J. M. Stevens was right, and that the Court committed no error, and that this Court should affirm the judgment of the lower Court and approve the dismissal of said action.

Respectfully submitted,

J. M. STEVENS,

Pocatello, Idaho,

D. D. MOTE,

Pocatello, Idaho,

Solicitors for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

K. HIRATA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of
the Western District of Washington, Northern Division.

FILED

AUG 23 1922

F. D. MONCKTON,
CLERK

United States
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Bill of Exceptions.....	9
Arraignment and Plea.....	4
Assignment of Errors.....	23
Bail Bond	6
Certificate of Clerk U. S. District Court to Transcript of Record.....	30
Citation on Writ of Error.....	34
Indictment	1
Motion for New Trial.....	5
Motion for Return of Evidence and Suppression of Same.....	10
Names and Addresses of Counsel.....	1
Order Allowing Writ of Error.....	26
Order Denying Motion for New Trial.....	6
Order Extending Time Thirty Days to File Bill of Exceptions and Citation—Dated June 24, 1922	35
Order Extending Time to and Including June 12, 1922, to File Record and Docket Cause.	36
Order Settling Bill of Exceptions.....	20
Petition for Writ of Error.....	21
Praecipe for Transcript of Record.....	28

Index.	Page
Stipulation Re Printing Transcript of Record.	27
TESTIMONY ON BEHALF OF THE GOV- ERNMENT:	
ANDERSON, N. P.	12
Cross-examination	14
BAERMAN, R. F.	15
LATHAM, R. W.	18
Verdict	4
Writ of Error	32

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[1*]

[Title of Court and Cause.]

No. 6243.

Indictment.

Vio. Act of Dec. 17, 1914, as amended.

The United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America,
being duly selected, impaneled, sworn and charged
to inquire within and for the Northern Division of
the Western District of Washington, upon their
oaths present:

*Page-number appearing at foot of page of original certified
Transcript of Record.

That K. Hireta (whose true given name is to the grand jurors unknown), on the sixth day of July, in the year of our Lord one thousand nine hundred and twenty-one, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did then and there knowingly, wilfully, unlawfully and feloniously, and not in the original stamped package nor from the original stamped package, purchase from a person whose name is to the grand jurors unknown, a quantity, to wit, four (4) packages each containing ten (10) grains, three (3) packages each containing forty-five (45) grains, five (5) packages each containing thirty (30) grains, six (6) packages each containing two (2) grains, and one (1) package containing five (5) grains, of a certain compound, manufacture, salt, derivative and preparation of opium, to wit, morphine, and a quantity, to wit, twenty-one (21) [2] packages each containing thirty (30) grains, one (1) package containing one (1) ounce, and one (1) package containing one-half ($1\frac{1}{2}$) ounce, of a certain compound, manufacture, salt, derivative and preparation of coca leaves to wit, cocaine; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

That K. Hireta (whose true given name is to the grand jurors unknown), on the sixth day of July,

in the year of our Lord one thousand nine hundred and twenty-one, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, did then and there knowingly, wilfully, unlawfully and feloniously manufacture, produce, compound, sell, deal in, dispense, distribute, administer and give away a certain compound, manufacture, salt, derivative and preparation of opium, to wit, morphine, and a certain compound, manufacture, salt, derivative and preparation of coca leaves, to wit, cocaine, without having registered and paid the special tax as required and imposed by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ROBERT C. SAUNDERS,
United States Attorney.

CHARLOTTE KOLMITZ,
Assistant United States Attorney. [3]

[Indorsed]: A True Bill. A. M. Schillestad, Foreman Grand Jury. Presented to the Court by the Foreman of the Grand Jury in Open Court, in the presence of the Grand Jury, and Filed in the U. S. District Court September 21, 1921. F. M. Harshberger, Clerk. [4]

In the United States District Court for the Western
District of Washington, Northern Division.

No. 6243.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. HIRETA,

Defendant.

Arraignment and Plea.

Monday, September 26, 1921.

Now on this 26th day of September, 1921, the above-named defendant comes into open court for arraignment accompanied by his attorney Walter Metzenbaum and says that his true name is the same. Whereupon the reading of the information is waived and he here and now enters his plea of not guilty.

Journal Vol. #9, p. 317. [5]

[Title of Court and Cause.]

No. 6243.

Verdict.

We, the jury in the above-entitled cause, find the defendant K. Hireta, is guilty, as charged in Count I of the indictment herein; and further find the defendant K. Hireta, is guilty, as charged in Count II of the indictment herein.

C. B. SANDERSON,
Foreman.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Nov. 30, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

[Title of Court and Cause.]

No. 6243.

Motion for New Trial.

Comes now defendant and moves the Court to set aside the verdict of the jury heretofore entered herein and grant a new trial of the above-entitled cause on the following grounds:

(1) That said verdict is against and contrary to law.

(2) Said verdict was against and contrary to the evidence.

(3) Errors of law occurring during the trial and excepted to at the time by defendant.

(4) Erroneous instructions given to the jury by the trial judge and excepted to at the time.

(3) That counts I and II of the indictment failed to state facts sufficient to show the commission of any offense by the defendant

(4) Misconduct of the prevailing party.

WALTER METZENBAUM,

Attorney for Defendant.

State of Washington,
County of King,—ss.

Walter Metzenbaum, being first duly sworn, on oath deposes and says: That he is the attorney for defendant in the above numbered and entitled

cause; that as such he prepared said motion, knows the contents thereof and that he believes the same to be meritorious and well founded in law.

WALTER METZENBAUM,

Subscribed and sworn to before me this 12th day of December, 1921.

[Notary Seal] BURTON E. BENNETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 12, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

[Title of Court and Cause.]

No. 6243.

Order Denying Motion for New Trial.

Now on this 12th day of December, 1921, the above defendant comes into open court with Walter Metz-enbaum, his attorney and files a motion for new trial. Said motion is denied.

Journal Vo. 9, p. 428. [8]

[Title of Court and Cause.]

No. 6243.

Bail Bond.

We, K. Hirata, of Seattle, Washington, as principal, and L. C. Jacobson and Michael Cohen, as sureties, jointly and severally acknowledge our-

selves to be indebted unto the United States of America in the sum of \$3000, lawful money of the United States to be levied of our goods and chattels, lands and tenements, for the payment of which well and truly to be made, we bind ourselves and each of us, our heirs and executors, jointly and severally firmly by these presents.

The conditions of the above obligation is such that whereas in the above-entitled cause a Writ of Error has been issued to the Circuit Court of Appeals for the Ninth Circuit from the judgment and sentence entered therein, and an order has been entered fixing the amount of the bail bond for the release of the defendant, K. Hirata, upon bail pending the determination of said Writ of Error by said Appellate Court in the sum of \$3000.

NOW, THEREFORE if the said K. Hirata as principal obligor shall appear and surrender himself in the above-entitled court and from time to time thereafter as he may be required to answer any further proceedings and shall obey and perform any judgment or order which may be had or surrendered in said cause and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit and shall not depart from the said District without leave first having been obtained from the Court, then this obligation shall be null and void, otherwise of full force and effect. [9]

IN WITNESS WHEREOF we have set our hands and seals the 23d day of December, 1921.

K. HIRATA,

By WALTER METZENBAUM, (Seal)

His Atty.,

Principal.

L. C. JACOBSON, (Seal)

MICHAEL COHEN, (Seal)

Sureties.

State of Washington,
County of King,—ss.

L. C. Jacobson and Michael Cohen being first duly sworn, each for himself says: That he is a citizen of the United States; over the age of twenty-one years and a resident of King County, Washington; that he is not an attorney or counselor at law; sheriff or other officer of any court; that he is worth in his own separate property within the state of Washington and over and above all his just debts and liabilities exclusive of property free from sale on execution the sum of \$6000.

L. C. JACOBSON.

MICHAEL COHEN.

Subscribed and sworn to before me this 21st day of December, 1921.

[Notarial Seal]

WALTER METZENBAUM,

Notary Public in and for the State of Washington,
Residing at Seattle.

O. K.

THOS. P. REVELLE,

United States Attorney.

Approved:

NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 24, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

[Title of Court and Cause.]

No. 6243.

Amended Bill of Exceptions.

BE IT REMEMBERED, that heretofore, to wit, on the 30th day of November, 1921, this cause came on for trial before the Honorable Jeremiah Neterer, Judge presiding, the plaintiff appearing by Thomas P. Revelle, United States Attorney, the defendant appearing in person and by his attorneys, Thomas D. Page, and Walter Metzenbaum.

THEREUPON, the following proceedings were had: Prior to the calling and empanelling of the jury and after the case was called for trial, the defendant interposed a motion to dismiss the case and discharge the defendant from custody upon the ground that no search-warrant was used or issued at the time of the search of the defendant's premises and the seizure of the contraband upon which the charge contained in the several counts of the indictment were based. This motion is based upon the following motion: [11]

In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.

No. 5243.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. HIRATA,

Defendant.

**Motion for Return of Evidence and Suppression of
Same.**

Comes now the defendant and moves this Court
for an order returning to the defendant and en-
joining the United States District Court for the
Western District of Washington from introducing
in evidence the following morphine and cocaine in
the trial of this cause:

Morphine.

4 packages	10 grains each
3 packages	45 grains each
5 packages	30 grains each
6 packages	2 grains each
1 package	5 grains each

Cocaine.

21 packages	30 grains each
1 package	1 ounce
1 package	1½ ounce

This motion is based on the fact that the said mor-
phine and cocaine were found on the premises and
in the residence of the defendant and that said prem-

ises were entered on that said occasion without a search-warrant by the arresting officers and said morphine and cocaine were taken without the aid of any search-warrant and in violation of the constitutional rights of the defendant.

T. D. PAGE,

WALTER METZENBAUM,

Attorneys for Defendant. [12]

Mr. PAGE.—If your Honor please, I want to interpose a motion, I think this is the proper time to do it, before the taking of the evidence. I move to dismiss this case on the ground that there was no search warrant issued at the time of the taking and seizure of the stuff.

The COURT.—It is too late to raise it now.

Mr. PAGE.—The jury have not been empaneled.

The COURT.—It is too late.

Thereupon, the Court overruled and denied said motion and to the said order of the Court the defendant asked and was allowed an exception. At the time of the presentation of this motion the following proceedings were had:

Mr. PAGE.—I will submit it and take an exception. Let the record show I take an exception to the ruling of the Court, and submit the motion.

The COURT.—Note the exception.

Thereupon the jury was empaneled and sworn and the opening statement of the Government was made.

Testimony of N. P. Anderson, for the Government.

Thereupon Witness N. P. ANDERSON was called by the Government and after being duly sworn testified that on the 6th day of July, 1921, he was a police officer of the city of Seattle and was present at the Hub Hotel at the time of the arrest of the defendant (Tr. p. 3); that it was arranged by the officers present that a girl addict should approach the defendant for the purpose of purchasing from the defendant narcotics; that before the girl went into the hotel witness went in the Watson Hotel, which adjoins the Hub Hotel, and entered the Hub Hotel through a fire door connecting the Watson Hotel and the Hub Hotel; that after entering the Hub Hotel witness concealed himself in a bathroom on the third floor of the same; that while witness was in the bathroom he heard [13] the Japanese talking to the girl on the second floor of the hotel and recognized her voice; then the Japanese came running up the steps from the second floor to the third floor and from the third floor to the fourth floor. Witness then left the bathroom and walked up the steps leading to the fourth floor. Witness then heard the Japanese walking to the front of the building on the fourth floor, where he went into a room on the right-hand side. Witness then returned to the bathroom and closed the door and in about two minutes heard the Japanese come down the steps (Tr. p. 4) and down to the second floor, where he heard him again talking to

(Testimony of N. P. Anderson.)

the woman. He could not hear what they were talking about but recognized their voices. In three or four minutes he heard some loud talking by the Japanese on the second floor and witness then went down to the second floor and the officers had the defendant handcuffed. Defendant was then searched and upon his person were found three one-dollar bills which had been marked by the officers and which were the bills previously given to the girl addict. The officers then took the defendant to the fourth floor and into the front room where witness had seen him enter. In the presence of witness Officer Baerman searched the room and raised the carpet. Underneath the carpet there was a piece of board about 4x14 inches which was loose, and underneath the board there was found by Officer Baerman a cigarbox full of drugs put up in packages. Witness then asked the defendant if he had any more and defendant said, "Yes, there is some more there." Defendant indicated where it was and witness got down and reached in the hole again in the floor and pulled out a lady's black stocking containing narcotics (Tr. p. 5). Witness identifies Government Exhibit No. 1 as the box of narcotics taken out of the floor (Tr. p. 6); witness identifies lady's black stocking [14] containing narcotics as Government's Exhibit No. 2. Witness identifies package of morphine, Government's Exhibit No. 3, as package found in the possession of the girl addict after her transaction with defendant.

(Testimony of N. P. Anderson.)

Witness further identifies his initials on said package of morphine (Tr. p. 7).''

On cross-examination of this witness, the following proceedings were had:

Mr. PAGE.—Q. Do you know what that stuff is you have in your hand?

A. I can judge; it either is morphine or cocaine.

Q. You didn't have any search-warrant when you went in there? A. No, sir.

Q. I move at this time, if your Honor please, to strike all of the testimony, unless they had a *bona fide* search-warrant.

COURT.—Denied.

Mr. PAGE.—Exception.

Q. Now, you knew you had no right in that building without a search-warrant?

The COURT.—I have already ruled that out, Mr. Page; no use in repeating it.

Mr. PAGE.—Can't I ask if that is the law of the State of Washington?

The COURT.—You can have your exception.

Witness further testified on cross-examination that he is a city policeman and at the time of the arrest of the defendant and prior thereto, he was accompanied by another city police officer, R. F. Baerman and Joe Peak, an agent of the White Cross; that there were no Federal agents in the case and no Federal agents or officers present when the arrest was made, or the search was made. That the girl addict was assisting the police officers [15]

(Testimony of N. P. Anderson.)

and was not a Federal agent (Tr. p. 12). That the defendant after his arrest attempted to bribe the officers and in attempting to do so gave them \$75.00 in cash and a check for \$225.00."

Testimony of R. F. Baerman, for the Government.

Thereupon a witness R. F. BAERMAN was called by the Government and after being duly sworn testified that he was a police officer of the city of Seattle at the time of the arrest of the defendant and was present at the time he was arrested. That at the time of the arrest they sent a girl into the Hub Hotel, of which the defendant was proprietor (Tr. p. 16). That prior to her going into the hotel witness gave her \$3.00 in marked money. That the office of the Hub Hotel is on a mezzanine floor; that witness saw the girl meet the defendant in the office and go up the stairway with the defendant to the second floor; that he didn't see her then until she came out. About five or six minutes later, probably a little longer, she came out with a package of morphine in her hand and handed it to witness. Witness then immediately went inside the hotel (Tr. p. 17), walked down to the end of the hall to a room, opened the door and found the defendant in the room. The defendant had a can of money containing silver dollars, a five-dollar bill and a ten-dollar bill, which he threw away. Witness then held the defendant, handcuffed him and asked him where the rest of the stuff was. Defendant said he had no more stuff, that that was all he had. By

(Testimony of R. F. Baerman.)

that time Officer Anderson appeared. The defendant was then searched and the three one-dollar marked bills were taken from his side pocket; that witness had the numbers of the bills on an envelope, which envelope is in evidence.

Witness read the numbers of the bills to the defendant. Then defendant admitted he had sold the morphine and wanted to fix it up right away, saying "I haven't got any more" (Tr. p. 18). Then defendant was taken to the room on the fourth floor and [16] Officer Anderson held the defendant. Witness searched the room and noticed the carpet was not stretched very tight and witness pulled the carpet back and found two boards in the floor that were out and worn from use. Witness put his fingernails at the end of the board and wrenched them out and found in the hole in the floor a cigar-box full of papers of dope. Officer Anderson asked the defendant if he had any more stuff in there and defendant answered: "Yes, there is some more in there," and defendant showed witness which end of the hole it was in. It was in the end of the rafters that pointed south. Officer Anderson reached in and pulled out a stocking containing cocaine. Defendant said he wanted to fix things up with the officers and defendant then took the officers to another room (Tr. p. 19) and first offered the officers \$50.00 and then raised it to \$100.00 apiece, and finally wrote a check for \$225.00, making it payable to himself and endorsed the back of the

(Testimony of R. F. Baerman.)

check and gave the officers \$75.00 in cash besides to let him go. That the officers then took him to jail. Witness identifies Government's Exhibit No. 1 as the box that was found in the floor (Tr. p. 20). That the packages of narcotics found in the hole in the floor corresponded to the package the girl had in her hand when she came out of the hotel. Defendant identifies Government's Exhibit 3 as the package of morphine found in the possession of the girl and identifies the three one-dollar marked bills (Tr. p. 21). Witness identifies Government's Exhibit 2 as the cocaine found in the silk stocking. Whereupon the following proceedings were had:

At the close of the testimony of this witness the Government offered the three packages of morphine identified by the witness as follows:

Mr. MOUNT.—At this time, if your Honor please, I offer in evidence Government's Exhibits 1, 2 and 3.

Mr. PAGE.—I object to them upon the ground there is no warrant [17] shown for the arrest of this man in the first instance—no search-warrant as required by law.

The COURT.—Overruled.

Mr. PAGE.—Exception.

Thereupon the three packages of morphine were received in evidence and marked Government's Exhibits 1, 2 and 3.

Testimony of R. W. Latham, for the Government.

And thereupon Witness R. W. LATHAM was called by the Government and after being duly sworn, testified that he was a narcotic inspector for the Federal Government; that prior to his connection with the Federal Government he had been in the drug business and that he was a registered pharmacist; that he had practiced his profession or trade for about fifteen years and had had experience with cocaine and morphine, and that he had examined the contents of Government's Exhibits 1, 2 and 3. Witness was handed Government's Exhibits 1, 2 and 3, and testified that it contained about ten grains of morphine hydrochloride (Tr. p. 25).

Witness was handed Government's Exhibit No. 2 and testified that it contained about one ounce of cocaine hydrochloride. Witness was handed Government's Exhibit No. 1 and testified that the larger packages contained in the box, each contained forty-five grains of morphine, and the smaller packages of the exhibit each contained thirty grains of cocaine; that the contents of Government's Exhibit No. 1 were as follows: four packages of morphine each containing ten grains, three packages of morphine each containing 45 grains, five packages of morphine each containing 2 grains, one package of morphine containing five grains, twenty-two packages of cocaine each containing thirty grains, one package of cocaine containing one ounce, and

another package of cocaine containing one-half ounce."

Thereupon the government rested its case and the following proceedings took place. [18]

Mr. PAGE.—I will move the United States Attorney to elect as to which one of these counts he intends to stand on. They have offered no evidence as to Count One of the sale; the other is the possession. I am satisfied your Honor recognizes there has not been any evidence here but uncorroborated statements of the officers who sent the girl to make a sale.

COURT.—Motion denied.

Mr. PAGE.—Exception.

Thereupon evidence was introduced for and on behalf of the defendant and, after the Court had instructed the jury, the jury retired for deliberation and on the 30th day of November, 1921, returned and filed a verdict finding the defendant guilty on Count One and on Count Two of the indictment. [19]

United States District Court, Western District of
Washington, Northern Division.

No. 6243.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. HIRATA,

Defendant.

Order Settling Bill of Exceptions.

Defendant herein having tendered and presented his bill of exceptions in this cause to the action of the Court and in furtherance of justice and that right may be done, and having prayed that the same may be settled and allowed, authenticated, signed and sealed by the Court and made a part of the record herein, and the Court having considered said bill of exceptions and all objections and proposed amendments made thereto by the Government, and being now full advised, does now sign, seal, settle and allow said bill of exceptions as the bill of exceptions in this cause, and it is **ORDERED** that the same may be made a part of the record herein.

And the Court further certifies that each and all of the exceptions taken by the defendant, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

And the Court further certifies that said bill of exceptions contains all the evidence in said cause and everything material to each and every assignment of error made by the defendant and tendered and filed in this cause with said bill of exceptions.

And the Court further certifies that said bill of exceptions [20] was filed and presented to the Court within the time provided by law.

Done in open Court, counsel for the Government and defendant being present, this 29th day of March, 1922.

JEREMIAH NETERER,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, March 29, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

[Title of Court and Cause.]

No. 6243.

Petition for Writ of Error.

To the Above-Entitled Court and to the Hon. Jeremiah Neterer, Judge of the United States District Court Aforesaid:

Now comes the above-named defendant and by his attorneys, Thomas D. Page and Walter Metzenbaum and respectfully shows:

That heretofore and on the 30th day of November, 1921, a jury in the above-entitled Court and cause returned and filed herein a verdict finding the above-named defendant guilty upon Counts I and II of an indictment theretofore filed in the above-entitled Court and cause, and against the defendant herein on the 21st day of September, 1921; that thereafter and on the 24th day of December, 1921, the defendant was by the order and sentence of the above-entitled Court and in said cause sentenced to 15 months at McNeil Island Penitentiary your petitioner herein, the above-named defendant, feeling himself aggrieved by the said verdict and said judgment and the said sentence of the Court entered herein as aforesaid and by the orders and

rulings of said Court and proceedings therein, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States and in accordance with the procedure of said Court in such cases made and provided to the end that the said proceedings as herein recited and as more fully set forth in the assignments of error presented herewith may be reviewed and the manifest error appearing from the [22] face of the record of said proceedings may be by said Circuit Court of Appeals corrected, and that for said purpose a writ of error and citation thereon should issue as by the law and the ruling of the Court is provided, whereupon the premises considered, your petitioner prays that a writ of error do issue to the end that the said proceedings of the United States District Court for the Western District of Washington may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith; that pending the final determination of said writ of error by said Appellate Court an order be made and entered herein that all further proceedings shall be suspended and stayed until the determination of said writ of error by said Circuit Court of Appeals.

T. D. PAGE,

WALTER METZENBAUM,

Attorneys for Petitioner, the Plaintiff in Error.

Due and legal service of the foregoing petition

for a writ of error is admitted this 2d day of December, 1921.

U. S. Attorney.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 24, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

[Title of Court and Cause.]

No. 6243.

Assignment of Errors.

Now comes the defendant, K. Hirata, and in connection with his petition for a writ of error in this cause, assigns the following errors which said defendant avers occurred on the trial thereof, and upon which he relies to reverse the judgment entered herein as appears of record.

I.

The Court erred in overruling the defendant's motion to dismiss the cause on the ground that no search-warrant was used or issued at the time of the search of the defendant's premises and the seizure of the contraband to be used as evidence, which motion was interposed at the time the cause was called for trial and before the impanelling of the jury.

II.

The Court erred in refusing to grant the motion

of the defendant to strike all of the testimony of N. P. Anderson, a witness for the plaintiff, which motion was based upon the ground that the testimony of this witness and the evidence introduced by him was based upon and secured by reason of illegal search of defendant's premises.

III.

The Court erred in refusing to permit the defendant to interrogate the witness, N. P. Anderson, a witness for the plaintiff, as to whether he had searched the premises of the defendant without a search-warrant and as to whether the witness knew that it was a [24] criminal offense under the laws of the State of Washington to search a man's home or place of business without a valid search-warrant.

IV.

The Court erred in admitting in evidence over the objection of the Defendant's Exhibits Nos. 1, 2 and 3 introduced by the plaintiff for the reason that said exhibits were secured by an illegal and invalid search and seizure.

V.

The Court erred in denying the defendant's motion to require the plaintiff to elect as to which of the counts of the indictment it would stand on for a conviction.

VI.

The Court erred in submitting this cause to a jury for the reason that there was no evidence upon which a conviction could be sustained.

VII.

The Court erred in denying the defendant's motion for a new trial herein which motion was made in due time as the jury had returned a verdict of guilty and was upon the following grounds:

1. That said verdict was against and contrary to law.

2. That said verdict was against and contrary to the evidence.

3. Insufficiency of the evidence to justify the verdict.

4. Error of law occurring during the trial and excepted to at the time by the defendant.

VIII.

The Court erred in imposing the sentence herein.

WHEREFORE the defendant, K. Hirata, prays that the judgment of said court be reversed and this cause remanded to the said District Court with directions to dismiss the same and discharge said defendant [25] from custody and exonerate the sureties on his bail bond.

WALTER METZENBAUM,

T. D. PAGE,

Attorneys for Defendant.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 24, 1921. F. M. Harshberger, Clerk, By S. E. Leitch, Deputy. [26]

In the District Court of the United States for the
Western District of Washington, Northern
Division.

No. 6243.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. HIRATA,

Defendant.

Order Allowing Writ of Error.

Now on this 24th day of December, 1921, came the defendant, K. Hirata, and filed herein and presented to the Court his petition praying for the allowance of his writ of error intended to be urged by him which petition was accompanied by an assignment of errors relied upon by the defendant, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such order and further proceedings may be had as may be proper in the premises, and that an order be made approving the bond heretofore furnished by the defendant and staying all further proceedings until the determination of said writ of error by the said Circuit Court of Appeals, now, in consideration of said petition and being fully advised in the premises the Court does hereby allow the said writ of error, and

IT IS HEREBY ORDERED that the security furnished by the defendant for his appearance whenever required according to the conditions of his bond is hereby approved and all further proceedings are hereby suspended herein until the determination of said writ of error by the said Circuit Court of Appeals.

JEREMIAH NETERER,

Judge of the United States District Court, for the
Western District of Washington, Northern
Division. [27]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Dec. 23, 1921. F. M. Harshberger, Clerk, By S. E. Leitch, Deputy. [28]

[Title of Court and Cause.]

No. 6243.

Stipulation Re Printing Transcript of Record.

It is hereby stipulated between plaintiff and defendant through their respective attorneys that the following designated papers comprise all the papers, exhibits and proceedings which are necessary to the hearing of the cause upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and that none of said papers need to be included in the record of said Court:

Indictment, Plea, Verdict, Motion for New Trial, Order Overruling Motion for New Trial, Bond, Bill of Exceptions, Petition for Writ of Error, Assign-

ment of Errors, Allowance of Writ of Error, Writ of Error, Citation on Writ of Error, Stipulation as to Record, Clerk's Certificate.

It is further stipulated that, in preparing the printed record all captions except upon Writ of Error, Citation on Writ of Error and Order Allowing Writ of Error may be omitted.

And it is further stipulated that the time for filing bill of exceptions as well as that for filing record by defendant in the Clerk's office in the above-entitled court may be extended to and including June 12th, 1922.

THOMAS P. REVELLE,

JUDSON F. FALKNOR,

Attorneys for Plaintiff.

WALTER METZENBAUM,

Attorney for Defendant. [29]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jun. 7, 1922. F. M. Harshberger, Clerk, By S. E. Leitch, Deputy. [30]

[Title of Court and Cause.]

No. 6243.

Praecipe for Transcript of Record.

To the Clerk of the above-entitled Court:

You will please make up the transcript on appeal of the above numbered and entitled cause for printing the record thereof for the Ninth Circuit Court of Appeals at San Francisco:

Indictment.

Plea.

Verdict.

Motion for new trial.

Order overruling motion for new trial.

Bond.

Amended bill of exceptions.

Petition for writ of error.

Assignment of errors.

Allowance of writ of error.

Writ of error.

Citation on writ of error.

Stipulation as to record.

Clerk's certificate.

WALTER METZENBAUM,
Attorney for Appellant and Plaintiff in Error,
K. Hirata.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Jun. 7, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [31]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6243.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. HIRATA,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 31 inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing-entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I hereby further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [32]

Clerk's fee (Sec. 828 R. S. U. S.) for	
making record, certificate or return,	
64 fo. at 15c.....	\$9.60

Certificate of Clerk to transcript of record, 4 folios at 15c.....	.60
Seal to said certificate.....	.20

I hereby certify that the above cost for preparing and certifying record, amounting to \$10.40, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error, original citation, together with two original orders extending time to file the record herein.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 10th day of June, 1922.

[Seal] F. M. HARSHBERGER,
Clerk U. S. District Court, Western District
of Washington. [33]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. —.

K. HIRATA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Hon. JEREMIAH NETERER, Judge of the District Court of the Western District of Washington, Northern Division, and to said Court, GREETING:

Because in the record and proceedings as also in the rendition of the judgment and sentence in the District Court of the United States for the Western District of Washington, Northern Division, in a cause pending therein, wherein the United States of America was plaintiff and K. Hirata, defendant, a manifest error happened and occurred to the damage of the said K. Hirata, the above-named plaintiff in error as by his petition and complaint doth appear, and we being willing that error, if any there hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you that under your seal you send the record and proceedings aforesaid with all things concerning the same and pertaining thereto to the U. S. Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you may have the same at San Francisco where said court is sitting within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held and the records and proceedings aforesaid being inspected the said United States Court of Appeals may cause further

to be done therein to correct the error what of right and according to the law [34] and the custom of the United States should be done.

WITNESS the Hon. WILLIAM HOWARD TAFT, Chief Justice of the United States this 23d day of December, 1921.

[Seal]

F. M. HARSHBERGER,
Clerk.

Allowed this the — day of December, 1921.

United States Judge.

Received a copy of the foregoing writ of error this — day of December, 1921.

U. S. Attorney.

Filed in the United States District Court Western District of Washington, Northern Division. Dec. 24, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

In the United States District Court, Western District of Washington, Northern Division.

No. —.

K. HIRATA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error.

To the United States of America, GREETING:

You are hereby cited and admonished to be and appear in a session of the U. S. Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, state of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein K. Hirata is plaintiff in error and the United States of America is defendant in error, to show cause, if any there be, why the judgment rendered against K. Hirata, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the District Court of the United States, for the Western District of Washington, this 30th day of Dec. 1921.

[Seal]

JEREMIAH NETERER,

Judge.

Receipt of a copy and service of the foregoing citation this 30th day of December, 1921 is hereby admitted.

THOMAS P. REVELLE,

United States Attorney.

JUDSON F. FALKNOR,

Asst. U. S. Atty.

Filed in the United States District Court, Western District of Washington, Northern Division. Dec. 30, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [36]

In the U. S. District Court, Western District of Washington, Northern Division.

#6243.

STATE OF WASHINGTON,

Pltff.

vs.

K. HIRATA,

Defdt.

**Order Extending Time Thirty Days to File Bill
of Exceptions and Citation.**

On reading the stipulation heretofore entered into by counsel for above parties, the time for defendant in which to file his bill of exceptions is hereby extended 30 days from date of this order; and citation is also extended to same date.

Done in open court this Jun. 24/22.

EDWARD E. CUSHMAN,

Judge.

Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 24, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [37]

In the District Court of the United States, for the
Western District of Washington, Northern Di-
vision.

No. 6243.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

K. HIRATA,

Defendant.

**Order Extending Time to and Including June 12,
1922, to File Record and Docket Cause.**

Now, upon the motion of defendant and good
cause being shown, it is hereby

ORDERED that the time for preparing and cer-
tifying for printing the transcript for appeal in the
above-entitled cause be, and the same is hereby
extended to and including June 12th, 1922.

Done in open court this 5th day of June, 1922.

J. NETERER,

Judge.

Filed in the United States District Court, West-
ern District of Washington, Northern Division.
Jun. 7, 1922. F. M. Harshberger, Clerk. By S. E.
Leitch, Deputy.

[Endorsed]: No. 3886. United States Circuit
Court of Appeals for the Ninth Circuit. K. Hirata,
Plaintiff in Error, vs. The United States of America,
Defendant in Error. Transcript of Record. Upon

Writ of Error to the United States District Court
of the Western District of Washington, Northern
Division.

Filed June 13, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3886

United States 4
Circuit Court of Appeals
For the Ninth Circuit

K. HIRATA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

WRIT OF ERROR

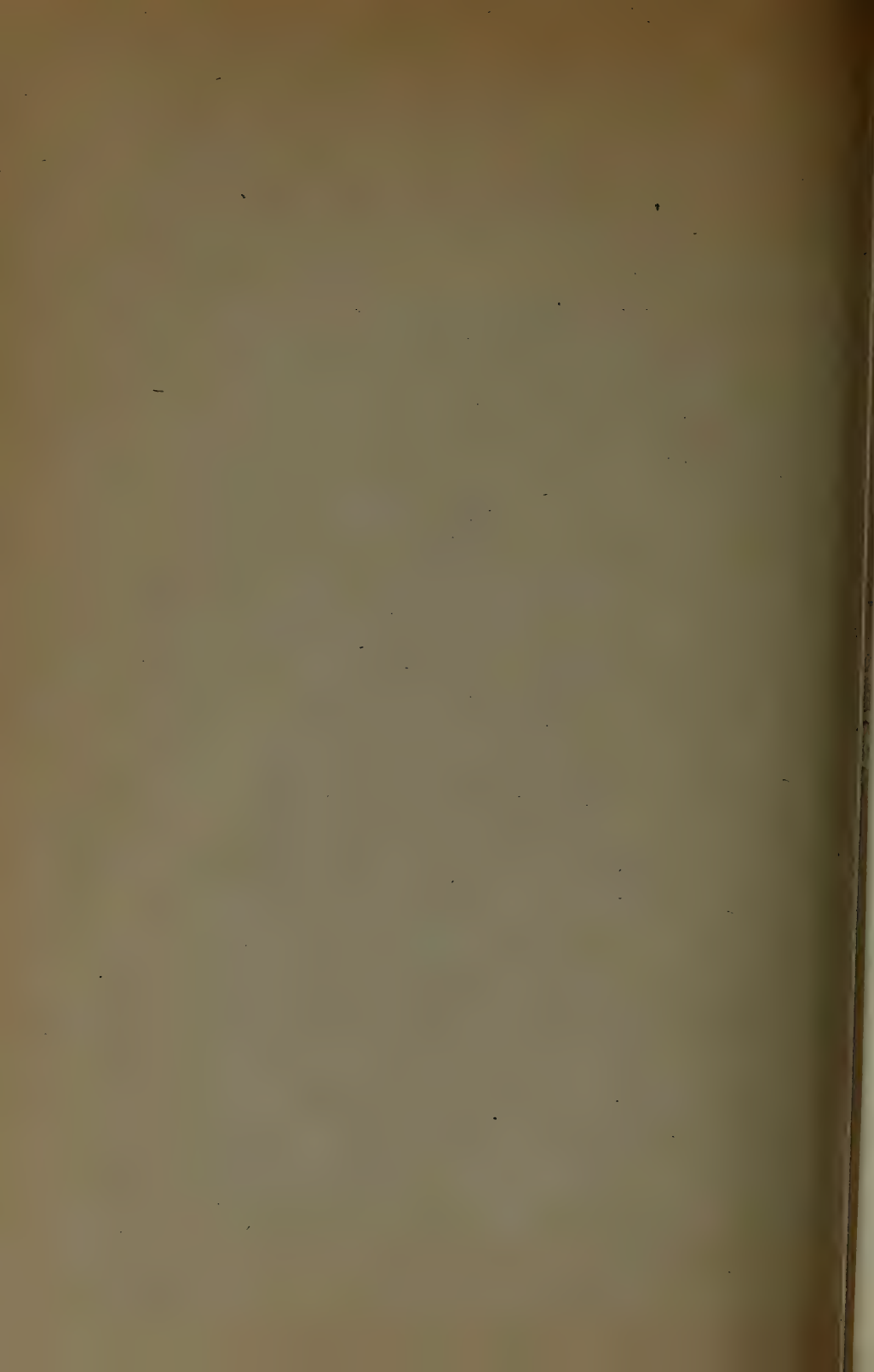
FROM THE UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JEREMIAH NETERER, *Judge.*

BRIEF OF PLAINTIFF IN ERROR

WALTER METZENBAUM,
Attorney for Plaintiff in Error.

500 Pacific Block,
Seattle, Washington.



IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH
CIRCUIT

No. 3886

K. HIRATA,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

STATEMENT OF THE CASE.

The plaintiff in error was indicted in the lower court on two counts for violating the Harrison Narcotic Act. In the first count he was charged with illegal possession of a certain quantity of narcotics and in the second count he was charged with selling a certain quantity of narcotics (transcript, pages 1, 2, and 3). To this indictment and to the separate counts therein the plaintiff in error pleaded not guilty (transcript, page 4). Thereafter on the 30th day of November, 1921, the cause came on regularly for trial before the Honorable Jeremiah Netterer, judge presiding. Prior to the calling and impaneling of the jury and after the case was called for trial, the plaintiff in error interposed a motion to suppress certain evidence, to-wit: a number of

packages of morphine and cocaine, which had been taken from the hotel conducted by the plaintiff in error, by the arresting officers, for the reason that the seizure had been made without the use of a search-warrant and in violation of the fourth and fifth amendments to the Federal constitution. The Court refused to hear any evidence in support of this motion and refused to consider the same on the ground that such a question could not be raised after the cause had been called for trial. To this ruling an exception was taken and allowed. Thereupon a jury was empanelled and sworn and evidence given on behalf of both parties. (Transcript pages 9, 10, and 11). No serious attempt was made on behalf of the government to establish a sale in support of count two of the indictment; the evidence practically in its entirety being directed to establishing possession of the narcotics in question by the plaintiff in error at the time and place charged in the indictment (transcript, pages 12 and 17).

In the matter of the search-warrant, the arresting officers testified that the search and seizure was made without the use or aid of a search warrant (transcript, page 14). In the matter of the alleged sale, the arresting officers testified that they had given an addict \$3 in marked money and sent her to the hotel conducted by the plaintiff in error to effect a purchase of narcotics. That in five or ten minutes thereafter the addict returned with a

small package or "bindle" of narcotics. That they immediately came into the hotel, found the plaintiff in error in the office on the second floor, and after a search of his person found him in possession of the three marked one-dollar bills. But whether these bills had been turned over to him by the addict for room rent or past indebtedness they were unable to state. The plaintiff in error denied any sale and explained that the \$3 had come into his possession in the regular course of business (transcript pages 12 and 13).

Thereafter the officers took the plaintiff in error through the rooms on the third and fourth floors of the hotel—a hotel consisting of some thirty odd rooms and finally on the fourth floor under the carpet they found the narcotics introduced in evidence (transcript, pages 12 and 13). At the close of the trial the jury returned a verdict of guilty on each of the two counts and after a motion for a new trial had been interposed and denied and an exception allowed to the ruling, the plaintiff in error was sentenced to fifteen months in the Federal penitentiary at McNeil's Island on each count to run concurrently (transcript, pages 4, 5 and 6).

ASSIGNMENT OF ERRORS

Now comes the defendant, K. Hirata, and in connection with his petition for a writ of error in this cause, assigns the following errors which said defendant avers occurred on the trial thereof, and

upon which he relies to reverse the judgment herein as appears of record:

I.

The Court erred in overruling the defendant's motion to dismiss the cause on the ground that no search-warrant was used or issued at the time of the search of the defendant's premises and the seizure of the contraband to be used as evidence, which motion was interposed at the time the cause was called for trial and before the impanelling of the jury.

II.

The Court erred in refusing to grant the motion of the defendant to strike all of the testimony of N. P. Anderson, a witness for the plaintiff, which motion was based upon the ground that the testimony of this witness and the evidence introduced by him was based upon and secured by reason of illegal search of defendant's premises.

III.

The Court erred in referring to permit the defendant to interrogate the witness, N. P. Anderson, a witness for the plaintiff, as to whether he had searched the premises of the defendant without a search-warrant and as to whether the witness knew that it was a (24) criminal offense under the laws of the State of Washington to search a man's home or place of business without a valid search-warrant.

IV.

The Court erred in admitting in evidence, over the objection of the defendants, Exhibits Nos. 1, 2 and 3 introduced by the plaintiff for the reason that said exhibits were secured by an illegal and invalid search and seizure.

V.

The Court erred in denying the defendant's motion to require the plaintiff to elect as to which of the counts of the indictment it would stand on for a conviction.

VI.

The Court erred in submitting this cause to a jury for the reason that there was no evidence upon which a conviction could be sustained.

VII.

The Court erred in denying the defendant's motion for a new trial herein, which motion was made in due time as the jury had returned a verdict of guilty, and was upon the following grounds:

1. That said verdict was against and contrary to law.

2. That said verdict was against and contrary to the evidence.

3. Insufficiency of the evidence to justify the verdict.

4. Error of law occurring during the trial and excepted to at the time by the defendant.

VIII.

The Court erred in imposing the sentence herein.

ARGUMENT

It is unnecessary to discuss at any length the error of the trial judge, on the question of the guilt or innocence of the plaintiff in error on the second count of the indictment, and this for several reasons:

In the first place, as pointed out in the statement of the case, there was no serious attempt on the part of the government to prove a sale. In the second place, no sale was proven. In the third place, if the Court erred in refusing to consider the motion of the plaintiff in error, to suppress the evidence unlawfully seized and improperly admitted in evidence, the cause must be reversed and a new trial ordered upon both counts of the indictment.

We pass now to a consideration of the principal and vital error in the case. The trial judge without a hearing on the merits peremptorily ruled that the motion to suppress was not timely and refused to receive any evidence in support of the same, or to give it any consideration whatsoever. This ruling was directly contrary to the decisions of the Supreme Court of the United States:

Amos vs. The United States, 255 U. S. 313;
Gaulet vs. The United States, 255 U. S.
41 Sup. Ct. 261.

In the first of the two cases cited, as this Court no doubt recalls, the jury had been impanelled and the trial actually commenced when the motion to suppress was interposed and yet the Court held that the motion was made in time and should have been considered.

While the actual search and seizure was made by two police officers of the City of Seattle, the plaintiff in error might and indeed could have established beyond all question that they were acting in conjunction with and under the supervision of the special agents of the Federal Government and had an opportunity been given to introduce this evidence, it would have been the duty of the trial judge to suppress the evidence seized and thereafter dismiss the cause.

It has been repeatedly held by the federal decisions that the government's participation, directly or indirectly, with an unlawful search and seizure will avoid the whole proceedings, (*United States vs. Falloco*, 277 Federal 75; *Slusser vs. U. S.*, 270 Federal 818; *Flogg vs. U. S.* 233 Federal 481; *Kanellos vs. U. S.*, 282 Federal 465; *Silverthorne vs. the U. S.*, 251 U. S. 385, 391). In the *Falloco* case, *supra*, in discussing this question the following very pertinent language was used:

"I am convinced, upon careful analysis, that the relationship between the state and federal officers in the cases at bar was such as to take these cases out of the rule just stated.

There were conferences between state and federal authorities. Those conferences were held with a view to a closer co-operation between the two jurisdictions in the enforcement of the prohibitory law. Our attention here is confined to the situation shown to exist during a restricted period, to-wit, the months of July and August of last summer. It is true undoubtedly, as suggested, that in the minds of the federal officers there was no purpose of expanding the federal jurisdiction, and bringing a greater flood of cases to the federal court. It is true that they had not in mind the use of unconstitutional summary methods of securing evidence, and that they desired greater activity in the way of prosecutions in the jurisdictions of the state; nevertheless the effect of these conferences was to stimulate activity on the part of the state authorities, with the objectiev of a more effective enforcement of the Volstead Act. The resulting procedure, whatever the underlying motive, was that, during the limited period referred to, the great majority of prosecutions in the federal court were initiated by the police officers of the state; that the violations in which arrests were made were brought, and intended to be brought, immediaetly to the federal court, and were not intended to be, and were not, taken to the state court, except, perhaps, in very exceptional cases, unless the federal authorities declined to take cognizance of them. On the other hand, the enforcement officers of the government understood this, acquiesced in it, and acted in accordance with this

tacit, if not express, understanding. Those arrested one day were brought regularly to the federal court on the following morning. The procedure was systematic and frictionless.

Under such circumstances, I do not think it necessary to show that the officers of the government had special knowledge, or issued special directions, in each specific case. If we were to ignore this circuitous, uninterrupted, but substantial evasion of the Fourth Amendment to the Constitution of the United States, even though that evasion was unconscious and unstudied, we should countenance a departure from the spirit of our fundamental law more harmful in its far reaching effects than the evil here sought to be remedied. Nothing herein said is to be construed as a surrender of the right of the government to avail itself, without stint, of evidence incidentally secured by state officers under the rules, principles, and conditions announced by the Supreme Court and other courts of the United States. I simply hold that, under the situation here presented by the record, the police officers in the cases at bar were so far recognized agencies of the government in the enforcement of the prohibitory law that their acts must be governed by the limitations imposed by the Federal Constitution. This being so, the applications of the defendants, Falloco and Ross, must be sustained."

In the case of the *United States vs. Maresca*, (276 Federal, 713), it was held that the greatest lati-

tude should be allowed in admitting evidence to prove that a search and seizure was in violation of the fourth and fifth amendments to the Federal Constitution. In the present case, the plaintiff in error was not permitted to introduce any evidence whatsoever, the trial court even refusing to consider the motion on its merits, and in consequence he was tried and convicted on evidence unlawfully seized.

In the light of the record and the decisions hereinabove cited, we respectfully submit that we are entitled to a reversal and retrial of this cause.

WALTER METZENBAUM,

Attorney for Plaintiff in Error.

In the United States Circuit Court of Appeals

For the Ninth Circuit

K. HIRATA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge Presiding.*

BRIEF OF DEFENDANT IN ERROR

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In the United States Circuit Court of Appeals

For the Ninth Circuit

K. HIRATA,

Plaintiff in Error,

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UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge Presiding.*

BRIEF OF DEFENDANT IN ERROR

STATEMENT OF THE CASE.

Plaintiff in error was charged by indictment with violation of the Harrison Narcotic Act [Act December 17, 1914, Chap. 1, Sec. 1, as amended (Comp. Stat. Sec. 6287-G)]. The indictment was laid in two counts, in the first of which plaintiff in error was charged with having on the 6th of July, 1921, "unlawfully and not in the original stamped package or from the original stamped package" pur-

chased some 342 grains of morphine and over 1½ ounces of cocaine. In the second count plaintiff in error was charged with unlawfully "selling, dealing, dispensing, and administering" narcotic drugs on the same day. The case came on duly for trial on the 30th of November, 1921, before the Honorable Jeremiah Neterer, Judge of the United States District Court of the Western District of Washington, Northern Division. Prior to the calling and impaneling of the jury, but after the case had been called for trial, counsel for plaintiff in error interposed his motion for return of evidence and suppression of the same. (Tr. pp. 9 and 10). The ground for the motion was that the premises in question were entered by the arresting officers and the seizure of the narcotic drugs made without a search warrant. The motion was overruled by the court on the ground that it was made at too late a date. (Tr. p. 11).

At the trial the following facts were developed:

On the 6th of July, 1921, certain police officers of the City of Seattle made arrangements with a girl addict to approach the plaintiff in error, who was a Japanese then residing at the Hub Hotel, Seattle, Washington, for the purpose of purchasing narcotic drugs from him (Tr. p. 12). N. P.

Anderson, one of the police officers, concealed himself in a bathroom on the third floor of the Hub Hotel and could hear the plaintiff in error talking to the girl addict on the second floor of the hotel just below him (Tr. p. 12). The other policeman, R. F. Baerman, was stationed on the outside of the hotel and saw the plaintiff in error and the addict meet in the office of the hotel on the mezzanine floor (Tr. p. 15). The arresting officers had previously given the addict \$3.00 in marked money with which to make the purchase (Tr. p. 15). Shortly afterwards plaintiff in error came running up the steps from the second floor to the fourth floor of the hotel, where he walked to the front of the building and was seen to enter a room on the right hand side (Tr. pp. 12 and 13). In about two minutes plaintiff in error went down the steps to the second floor, where he again engaged in conversation with the addict. Thereafter the addict went out of the hotel with a package of morphine in her hand which she handed to Officer Baerman (Tr. p. 15). This officer immediately went inside the hotel and found the plaintiff in error, who had a can of money containing silver dollars and a five-dollar bill and a ten-dollar bill, which he threw away. Plaintiff in error was then put under arrest and

searched. The three marked one-dollar bills hereinabove referred to were taken from his person (Tr. pp. 15 and 16). At this time plaintiff in error admitted that he had sold the morphine to the addict and wanted to fix it up right away, saying, "I haven't got any more." (Tr. p. 16). Plaintiff in error was then taken to the room on the fourth floor which he had previously been seen to enter. (Tr. p. 13). It was noticed that the carpet on the floor of the room was not stretched very tight, and one of the police officers pulled the carpet back and found two boards that were out and worn from use. These boards were lifted up, revealing a cigar box and a woman's stocking containing the narcotic drugs, more particularly described in the indictment (Tr. p. 16). The packages of narcotics found in this cache corresponded to the package the girl addict had in her hand when she came out of the hotel (Tr. p. 17). Shortly after the arrest plaintiff in error attempted to bribe the arresting officers, and went so far as to make out a check for \$225 to be given to the arresting officers in case they would let him go. (Tr. pp. 16 and 17).

Counsel for plaintiff in error at the time the drugs were offered into evidence by defendant in error again objected to their admission in evidence

on the ground that "There was no search warrant shown for the arrest of this man in the first instance, no search warrant as required by law." The objection was again overruled (Tr. p. 17). At the conclusion of the trial the jury returned with a verdict finding the defendant guilty on both counts of the indictment.

Plaintiff in error assigns as error the district court's refusal to pass on his motion for return of evidence and suppression of same, and this is the only question intended to be raised by the assignments of error.

ARGUMENT

The district court's refusal to consider plaintiff in error's motion for return and suppression of evidence was not reversible error for several reasons.

1. The motion was not timely made.
2. The evidence showed that the seizure was made by state officers, and hence could be adopted by the federal government whether legal or illegal.
3. There was no offer or attempt at any time on the part of the plaintiff in error to show connivance at, or participation in, the seizure by the fed-

eral officers, and hence plaintiff in error is in no position to urge error.

We discuss the points above made and relied on by us in the order raised.

I.

The seizure complained of took place on July 6, 1921 (Tr. p. 12). The motion for suppression and return of the property seized was not made until November 30, 1921, after the case had been called for trial (Tr. p. 9). Assuming that the narcotic drugs were taken without warrant or right in law, still that affords no legal objection to their admissibility in evidence where the application for their return and suppression as evidence was not filed within a reasonable time after the seizure. The court will not delay a criminal trial to inquire into a collateral issue as to whether evidence otherwise competent was lawfully obtained. Your Honors so held in the case of *Lyman v. United States*, 241 Fed. 945 (C. C. A. 9th Circuit), using the following language (241 Fed. at pages 948-9):

“In the case of *Adams v. New York*, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, it was adjudged, among other things, that the fact that papers which are pertinent to the issue may have been illegally taken from the

possession of the party against whom they are offered is no valid objection to their admissibility; that the court considers the competency of the evidence, and not the method by which it was obtained—citing, among other authorities, with its approval, the following from Greenleaf on Evidence (volume 1, Par. 254a) :

‘It may be mentioned in this place that, though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine that question.’

“In the late case of *Weeks v. United States*, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, the Supreme Court, while holding that the federal courts cannot, as against a seasonable application for their return, in a criminal prosecution, retain for the purposes of evidence the letters and correspondence of the accused, seized in his house, during his absence and without his authority, by a United States marshal holding no warrant for his arrest or for the search of his premises, still adhered to the rule laid down by it in *Adams v. New York*, to the effect that a collateral issue will not be raised to ascertain the source of

competent evidence, although illegally obtained, where no application has been made by the accused for its return before trial.

"In the present case it is not pretended that any such application was made on behalf of the plaintiff in error for the return of the records and papers, to the introduction of which objection was made on the trial, notwithstanding they had been seized, according to the statement contained in the brief for the government, more than two years before the trial took place; and that the records and papers so offered and received in evidence strongly tended to show the alleged guilt of the defendant to the indictment is not even questioned. We therefore are of the opinion that the trial court was right in its ruling admitting the evidence complained of."

The holding of the *Lyman case*, *supra*, has since been approved and followed in:

Rice v. United States, 251 Fed. 778 (C. C. A. 1st Circuit),

United States v. O'Dowd, 273 Fed. 600 (D. C.).

Directly in point is the case of the *State of Washington v. Dersiy*, 21 Wash. Dec., page 294; 208 Pac.: There the defendant was charged with the unlawful possession of intoxicating liquor. Immediately after the calling of the case for trial, and when the court was ready to make up a jury, but before any

prospective jurors had been called, the defendant moved the court to require the return of the liquor to him, and to suppress it as evidence in the case on the ground that it had been seized without a search warrant. The trial court declined to hear this motion for the reason that it was not timely made, and the defendant urged this ruling of the court as error on the appeal.

In disposing of this contention the Supreme Court of the State of Washington said (21 Wash. Dec. at pages 295 and 297) :

“When a case of this character is called for trial, the court is not required at that time to try out and investigate the circumstances under which the liquor was taken to determine whether it was admissible in evidence * * *. It may be conceded that circumstances may arise where it would be the duty of the court to stop in the midst of a trial and determine this collateral question, but the facts here do not present such a case. In any event, it is admitted by the appellant that, during the forenoon of the day before the case was called for trial, he learned for a certainty that the seizure had been accomplished without any search warrant. It was his duty, immediately upon obtaining the information, to make his motion to suppress the testimony and have it brought before the court. There is no showing why he did not do this. We find nothing in

the record which would excuse the appellant from presenting his motion at an earlier period."

The cases of *Gouled v. United States*, 255 U. S. 298; 41 Sup. Ct. Rep. 61; 65 L. E. 647, and *Amos v. United States*, 255 U. S. 313; 41 Sup. Ct. Rep. 266; 65 L. E. 654, cited by counsel as sustaining a contrary position are not in point.

In the *Gouled case*, *supra*, the lower court's refusal to sustain the objection to the admission in evidence of certain papers was sought to be upheld on the ground that the objection having been made for the first time at the trial was not seasonable. The Supreme Court said (255 U. S. page 305; 65 L. E. at page 651):

"The objection was not too late, for, coming, as it did, promptly upon the first notice the defendant had that the government was in possession of the paper, the rule of practice relied upon, that such an objection will not be entertained unless made before trial, was obviously inapplicable."

There is here no contention that plaintiff in error was surprised at the government's possession of the narcotic drugs or their introduction into evidence at the trial. The *Gouled case* then, instead of being authority for counsel's position, distinctly

recognizes the rule here relied upon by the government. The *Amos case*, *supra*, was decided on the same day as was the *Gouled case*, and both the opinions are by Mr. Justice Clarke. The reasons underlying the holding in the *Gouled case* are by a brief reference incorporated into the *Amos* decision, and the *Amos case* is therefore distinguishable upon the same grounds.

II.

Still assuming the search for and seizure of the narcotic drugs to have been without warrant or right in law, it does not follow that their introduction in evidence was violative of plaintiff in error's rights under either the Fourth or Fifth Amendments to the Federal Constitution. The former of these amendments prohibits unlawful searches and seizures, but is a limitation *only* upon the actions of the officers of the United States. The narcotic drugs, having been seized by state officers, were admissible in evidence in a federal court regardless of whether the original taking was legal or illegal.

Burdeau v. McDowell, 256 U. S. 465; 41 Sup. Ct. Rep. 574; 65 L. E. 1048,
Kanellos v. United States, 282 Fed. 461 (C. C. A. 4th Circuit),
M'Grew v. United States, 281 Fed. 809 (C. C. A. 9th Circuit).

Plaintiff in error can find no comfort in the case of *United States v. Falloco*, 277 Fed. 75 (D. C.), which holds that evidence obtained by a state officer by unlawful search is incompetent in a federal court if a federal officer co-operated with a state officer in the unlawful search. This doctrine has no application here because there is an entire absence of evidence of participation or co-operation by a federal officer—in fact, the record affirmatively shows that, “There were no federal agents in the case and no federal agents or officers present when the arrest was made, or the search was made. That the girl addict was assisting the police officers and was not a federal agent.” (Tr. p. 14). As the record now stands the district court could have done nothing but admit the proffered narcotic drugs in evidence, for the testimony was clear that the seizure was made by state officers without the participation or co-operation in any way by federal agents.

III.

At no time in this case, either before or during the trial, was any objection made to the use of the narcotic drugs as evidence other than that they had been seized without a search warrant. Counsel asserts on page 7 of his brief his ability to have

established that the arresting officers were acting under the supervision and in conjunction with the federal authorities. The record is devoid of any offer or attempt on his part to make such proof, and as before stated at the time the narcotic drugs were offered in evidence there was direct testimony that the seizure had taken place without co-operation or assistance of federal agents. The district court therefore, was clearly justified in assuming that counsel's only objection to the introduction of the narcotic drugs was the fact that they had been seized by police officers. We cannot now presume that had plaintiff in error attempted at any time to show that the arrest and seizure were made with the connivance and co-operation of the federal authorities that the district court would have refused to admit such proof. On the contrary the presumption is that had such an offer of proof been made, the court would have admitted testimony to substantiate it.

IV.

With reference to the point raised in plaintiff in error's brief as to the sufficiency of evidence to sustain count 2 or the "sale" count of the indictment, it is only necessary to make reference to the Transcript of Record (pages 12 to 19) which,

besides pointing conclusively to a sale of narcotic drugs by plaintiff in error as charged, contains an admission as to the making of the sale by him.

It is respectfully submitted in view of the authorities herein cited that the judgment of the district court should stand affirmed.

THOS P. REVELLE,
United States Attorney,
DE WOLFE EMORY,
Special Assistant United States Attorney,
Attorneys for Defendant in Error.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

No. 3886

K. HIRATA, *Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

PETITION FOR REHEARING

WALTER METZENBAUM

ATTORNEY FOR PLAINTIFF IN ERROR

500-501 PACIFIC BLOCK

SEATTLE, WASHINGTON

In the
United States Circuit Court
of Appeals
For the Ninth Circuit

No. 3886

K. HIRATA, *Plaintiff in Error,*
VS.
UNITED STATES OF AMERICA,
 Defendant in Error.

PETITION FOR REHEARING

Comes now the plaintiff in error, K. Hirata, and respectfully petitions to grant a re-hearing in the above entitled cause and in support of his petition submits the following reasons:

I

In the original brief of the plaintiff in error it was urged as a ground for reversal that the trial court had refused to hear or consider the defendant's motion to suppress certain evidence and re-

refused to hear any evidence in support thereof, and this court in its opinion refused to sustain this contention for the reason that it appeared in the evidence taken on the trial the arresting officers were police officers of the city of Seattle and consequently evidence illegally secured by them was properly admissible. In so ruling, this court seems to overlook the fact that the motion to suppress does not set forth in terms whether the unlawful seizure was made by federal or city officers but merely alleges in general terms that the seizure of the evidence in question was made without the aid of a search warrant. So far as the pleading is concerned it would have been just as fair and far more reasonable to assume that the seizure was made by federal officials or by a combination of city and federal officers, if assumptions were to be indulged in. No motion to make this pleading more definite and certain in this respect was interposed, in fact no opportunity was afforded to amplify this pleading by amendment or by evidence, for the reason that the trial court took the position that the motion was not timely and could not be considered for any purpose. As pointed out in the brief of the plaintiff in error, had opportunity been given, he might have been able to establish conclusively that the unlawful search and seizure was made by city policemen in conjunction

with and under the supervision of federal agents. Because that opportunity was not afforded, either in support of the motion to suppress or in support of the objection to the introduction of the evidence unlawfully seized at the time of trial, an error was committed which was prejudicial to the plaintiff in error and calls for a reversal of this cause.

Respectfully submitted,

WALTER METZENBAUM,
Attorney for Plaintiff in Error.

State of Washington, }
County of King, } ss.

Walter Metzenbaum, being first sworn on oath says: That he is the attorney for the plaintiff in error, K. Hirata, in the above entitled cause, and that the foregoing petition for rehearing is meritorious and is not interposed for the purpose of delay.

WALTER METZENBAUM.

Subscribed and sworn to before me this 14th day of July, 1923.

WILLIAM H. GILMORE,
Notary Public for the State of Wash-
ington, residing at Seattle.

(Notarial Seal.)

United States
Circuit Court of Appeals
For the Ninth Circuit.

R. C. KLEPPER, doing business under the fictitious
name of Bethlehem Motor Company,

Plaintiff in Error,

vs.

JOHN P. CARTER, Collector of Internal Revenue,
Southern District of California,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

FILED

JUN 15 1922

F. D. MONCKTON,
CLERK

No.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Agreed Statement of Facts.....	28
Amended Complaint	5
Answer	11
Assignment of Error.....	15
Bill of Exceptions.....	17
Citation	2
Cost Bond	36
Judgment	13
Names and Addresses of Attorneys	1
Order Extending Time.....	25
Petition for Writ of Error.....	35
Praecipe	39
Stipulations	24
Writ of Error.....	3

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UNITED STATES OF AMERICA, SS.

To John P. Carter, Collector of Internal Revenue,
Southern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 28th day of May, A. D. 1922, pursuant to a Writ of Error, filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause, wherein R. C. Klepper, doing business under fictitious name of Bethlehem Motors Company, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, R. C. Klepper, in the said Writ of Error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Oscar A. Trippet,
United States District Judge for the Southern District of California, this 28th day of April, A. D. 1922, and of the Independence of the United States, the one hundred and forty sixth

Trippet

U. S. District Judge for the Southern District of California.

[Endorsed]: 850 Civ In the United States Circuit Court of Appeals for the NINTH CIRCUIT R. C. Klepper, doing business under fictitious name of Bethlehem Motors Company vs. John P. Carter, Collector

of Internal Revenue, Southern District of California
Citation Service of copy of within citation is hereby
acknowledged this 28th day of April, 1922. Robert B
Camarillo Asst U. S. Atty FILED Apr 28 1922
CHAS. N. WILLIAMS, Clerk By R. S. Zimmerman
Deputy Clerk

UNITED STATES OF AMERICA, SS.

The President of the United States of America,

To the Judges of the District Court of the United
States, for the Southern District of California,
GREETING:

Because in the record and proceedings, and also in
the rendition of the judgment of a plea which is in
the said District Court, before you between R. C.
KLEPPER, doing business under fictitious name of
BETHLEHEM MOTORS COMPANY, Plaintiff, vs.
JOHN P. CARTER, Collector of Internal Revenue,
Southern District of California, Defendant, a manifest
error hath happened, to the great damage of the said
R. C. Klepper, Plaintiff, as by his complaint appears,
and it being fit, that the error, if any there hath been,
should be duly corrected, and full and speedy justice
done to the parties aforesaid in this behalf, you are
hereby commanded, if judgment be therein given, that
then, under your seal, distinctly and openly, you send
the record and proceedings aforesaid, with all things
concerning the same, to the United States Circuit
Court of Appeals for the Ninth Circuit, together with
this writ, so that you have the same at the City of
San Francisco, in the State of California, on the

28th day of May next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM H. TAFT,
Chief Justice of the United States, this 21st day of April, in the year of our Lord one thousand nine hundred and twenty-two and of the Independence of the United States the one hundred and forty six.

(Seal)

CHAS N WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

The above writ of error is hereby allowed.

Trippet

By R S ZIMMERMAN

Judge.

Deputy Clerk.

I hereby certify that a copy of the within Writ of Error was on the 25th day of April, 1922, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Chas N Williams

Clerk of the District Court of the United States for the Southern District of California.

By R S Zimmerman

Deputy Clerk.

Approved as to form

R. B. Camarillo,
Asst. U. S. Atty.

[Endorsed]: United States Circuit Court of Appeals for the NINTH CIRCUIT R. C. KLEPPER, Plaintiff in Error vs. JOHN P. CARTER, Int. Rev. Col. Defendant in Error Writ of Error FILED Apr. 25 1922 CHAS. N. WILLIAMS, clerk By R S Zimmerman Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA.

--- oOo ---

R. C. KLEPPER,)	
doing business under fictitious name	(
of Bethlehem Motors Co.)	
	(
	)	AMENDED
Plaintiff,	(	COMPLAINT
vs.	)	FOR MONEY
	(
JOHN P. CARTER,)	
Collector of Internal Revenue,)	
Southern District of California,	(
)	
Defendant,	(

--- oOo ---

The plaintiff complains of the defendant and for cause of action alleges:

I.

That the plaintiff R. C. Klepper is a resident of the City of Los Angeles, State of California, and

during all the times hereinafter mentioned plaintiff was doing business under the fictitious name of Bethlehem Motors Co. at and in the County of Los Angeles, State of California.

II.

That prior to the day and dates hereinafter mentioned plaintiff had in all things complied with provisions of Secs. 2466 and 2468 Civil Code of the State of California by subscribing a certificate stating his name in full and his place of residence which said certificate was duly acknowledged before a Notary Public in and for the County of Los Angeles, State of California, and which said certificate was filed with the County Clerk of Los Angeles County and afterward published once a week for four successive weeks in a newspaper of general circulation published in the said Los Angeles county.

III.

That the defendant John P. Carter was at the day and date hereinafter mentioned and is now the duly appointed and qualified United States Internal Revenue Collector, for the Southern District of the State of California.

IV.

That on the 2nd day of January 1920, the defendant as collector aforesaid presented to plaintiff an account for Internal Revenue Taxes which said account set forth a balance due from plaintiff to defendant in the sum of \$108.21.

V.

That the plaintiff, under the statutes in such cases made and provided, on the second day of January 1920, paid said sum of \$108.21, to the defendant, under protest.

VI.

That in fact no Internal Revenue taxes were due from plaintiff and the defendant, collector as afore-said received said sum for the use of plaintiff.

VII.

That on the 8th day of March 1920, plaintiff filed appeal, by claim for refund of said sum, to the commissioner of Internal Revenue, the same being the claim number 77472, in the office of the commissioner of Internal Revenue; that on the 3rd day of August 1920, the commissioner of Internal Revenue rejected said claim for refund.

VIII.

That plaintiff has demanded from defendant the said sum of 108.21, and the defendant has not paid said sum or any part thereof.

S E C O N D

And for other and further cause of action against defendant, plaintiff alleges:

I.

Plaintiff re-alleges the allegations set forth in paragraphs I. II. and III. of the First Count herein, the same as if repeated herein.

II.

That on the 2nd day of January 1920, the defendant as collector aforesaid presented to plaintiff an account for Internal Revenue taxes which said account set forth a balance due from plaintiff to defendant in the sum of \$297.19.

III.

That the plaintiff, under the statutes in such cases made and provided, on the second day of January, 1920, paid said sum of \$297.19.

IV.

That in fact no Internal Revenue taxes were due from plaintiff and the defendant, collector as aforesaid received said sum for the use of plaintiff.

V.

That on the 8th day of March 1920, plaintiff filed appeal, by claim for refund of said sum, to the commissioner of Internal Revenue, the same being the claim number 77506, in the office of the commissioner of Internal Revenue; that on the 3rd day of August 1920, the commissioner of Internal Revenue rejected said claim for refund.

VI.

That plaintiff has demanded from defendant the said sum of \$297.19, and the defendant has not paid said sum or any part thereof.

THIRD

And for other and further cause of action against defendant plaintiff alleges:

I.

Plaintiff re-alleges the allegations set forth in paragraph I. II. and III. of the First Count herein the same as if repeated herein.

II.

That on the 2nd day of January 1920, the defendant as collector aforesaid presented to plaintiff an account for Internal Revenue taxes which said account set forth a balance due from plaintiff to defendant in the sum of \$58.77.

III.

That the plaintiff, under the statutes in such cases made and provided, on the second day of January 1920, paid said sum of \$58.77.

IV.

That in fact no Internal Revenue taxes were due from plaintiff and defendant, collector as aforesaid received said sum for the use of the plaintiff.

V.

That on the 8th day of March 1920, plaintiff filed appeal, by claim for refund of said sum, to the commissioner of Internal Revenue, the same being the claim number 77469, in the office of the commissioner of Internal Revenue; that on the 3rd day of August 1920, the commissioner of Internal Revenue rejected said claim for refund.

VI.

That plaintiff has demanded from defendant the said sum of \$58.77, and the defendant has not paid said sum or any part thereof.

Wherefore, plaintiff demands judgment against the defendant collector, on his First Count, in the sum of \$108.21; and on his Second Count the sum of \$297.19; and on his Third Count the sum of \$58.77; making a total of \$464.17, and that plaintiff recover costs of suit.

Hocker & Austin

Attorneys for Plaintiff

[illegible]

R. C. Klepper being first duly sworn, deposes and says: That he is the plaintiff in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

R. C. Klepper

Subscribed and sworn to before me
this 30 day of Nov 1920.

Robert E. Austin

Notary Public in and for the County
of Los Angeles, State of California.
(Seal)

[Endorsed]: No. 850 Dept. IN THE UNITED STATES DISTRICT COURT FOR THE SOUTH-

ERN DISTRICT OF CALIFORNIA R. C. KLEPPER, doing business under fictitious name of BETHLEHEM MOTORS CO. Plaintiff, vs. JOHN P. CARTER, Collector of Internal Revenue, Southern District of California, Defendant, AMENDED COMPLAINT FOR MONEY Received copy of the within Am. Compl't this 2nd day of December 1920 Milton Bryan Attorney for Defendant Hocker & Austin 422 I. W. Hellman Bldg. Los Angeles, Calif. FILED Dec 2 1920 CHAS. N. WILLIAMS, Clerk By P. W. Kerr Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

R. C. KLEPPER, doing business)
under fictitious name of Bethlehem
Motors Co., (

Plaintiff,)

vs.

(ANSWER.

JOHN P. CARTER, Collector of)
Internal Revenue, Southern District
of California, (

Defendant.)

- - - - -

Comes now the defendant in the above entitled cause, and in answer to plaintiff's Amended Complaint filed herein, says that no allegation thereof is true.

Defendant answering the first cause of action contained in the Amended Complaint herein, denies each and every allegation of the Amended Complaint respecting the same.

Defendant answering the second cause of action contained in the Amended Complaint herein, denies each and every allegation of the Amended Complaint respecting the same.

Defendant, answering the third cause of action contained in the Amended Complaint herein, denies each and every allegation of the Amended Complaint respecting the same.

Robert O'Connor

United States Attorney.

Milton Bryan

Assistant United States Attorney

Attorneys for Defendant.

[Endorsed]: No. 850 Civil. IN THE District COURT OF THE UNITED STATES for the SOUTHERN DISTRICT of CALIFORNIA. SOUTHERN DIVISION. R. C. KLEPPER, doing business under the fictitious name of Bethlehem Motors Co Plaintiff. vs. JOHN P. CARTER, Collector of Internal Revenue, Southern District of California, Defendant. ANSWER. Received one copy of the within Answer this 13th day of December, 1920. Hocker & Austin Attorneys for Plaintiff. FILED Dec 13 1920. CHAS. N. WILLIAMS, Clerk By Wm U. Handy Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

R. C. KLEPPER, doing business)	
under the fictitious name of Bethle-)	
hem Motors Co.,)	850 Civil
)	
Plaintiff,)	
)	
-vs-)	JUDGMENT.
)	
JOHN P. CARTER, Collector of)	
Internal Revenue, Southern District)	
of California,)	
)	
Defendant.)	

This cause came on regularly before the Court for trial on the 7th day of February, 1922, plaintiff appearing by Messrs. Hocker and Austin, his attorneys, and the defendant appearing by Joseph C. Burke, Esq., United States Attorney, and Robert B. Camarillo, Esq., Assistant United States Attorney, his attorneys, and a jury trial having been waived by the parties, the case was submitted to the Court for decision upon an agreed statement of facts and the briefs on file and to be filed, and the Court having given due consideration to the facts and the law therein,

IT IS ORDERED, ADJUDGED AND DECREED
that the said cause be and the same is hereby dis-

missed, and that the defendant recover from the plaintiff his costs incurred in this action, taxed at \$14.55.

Dated April 12, 1922.

Trippet

Judge.

Approved as to form.

J. W. Hocker

Attorney for Plaintiff.

[Endorsed]: No. 850 Civil IN THE DISTRICT COURT OF THE UNITED STATES For The Southern District of California Southern Division R. C. KLEPPER, etc. vs. JOHN P. CARTER, etc. JUDGMENT. Filed April 12, 1922. Chas N Williams, Clerk. By Louis J. Somers, Deputy. Hocker & Austin

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

R. C. KLEPPER,)	
doing business under fictitious :		
name of BETHLEHEM MO-	)	No. 850-Civil.
TORS COMPANY,	:	
)	
	Plaintiff,	: ASSIGNMENT
)	
vs.	:	OF ERROR.
)	
JOHN P. CARTER,	:	
Collector of Internal Revenue)		
SOUTHERN DISTRICT OF :		
CALIFORNIA,)	
	:	
	Defendant.)

Comes now R. C. Klepper, doing business under the fictitious name of Bethlehem Motors Company, plaintiff in the above entitled cause, and files the following Assignments of Error upon which he relies in his prosecution of a Writ of Error in the above entitled cause; petition for which said Writ of Error to review the judgment of this Honorable Court, made and entered in said cause on the day of April, 1922, filed at the same time with this Assignment of Error.

ASSIGNMENT No. 1.

That the decision of the Court is not sustained by sufficient evidence.

ASSIGNMENT No. 2.

That the decision of the Court is contrary to the evidence.

ASSIGNMENT No. 3.

That the decision of the Court is contrary to law.

And upon the foregoing Assignments of Error and the record in said cause, the plaintiff prays that said judgment may be reversed.

J. W. Hocker

Robert E. Austin

Attorneys for Plaintiff.

[Endorsed]: No. 850 - Civil R. C. Klepper etc, Plaintiff vs. John P. Carter, etc, Defendant ASSIGNMENT OF ERROR FILED Apr 21 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

R. C. KLEPPER,)	
doing business under fictitious :)	
name of BETHLEHEM MO-	)	No. 850-Civil.
TORS CO.,)	
	:	
Plaintiff,)	
	:	BILL OF
vs.)	
	:	EXCEPTIONS.
JOHN P. CARTER,)	
Collector of Internal Revenue :)	
SOUTHERN DISTRICT OF))	
CALIFORNIA,	:	
Defendant.)	

BE IT REMEMBERED:

That the above entitled cause was submitted to the Court upon a brief Statement of Facts filed in said cause, which said Statement of Facts is in words and figures as follows, to-wit:

It is hereby stipulated by and between J. W. Hocker, and Robert E. Austin, Attorneys for the plaintiff, and the United States Attorney, Attorney for the defendant, that the above entitled cause may be submitted to the decision of the Court upon the following statement of facts:

"That during the year 1919, R. C. Klepper, a resident of the City of Los Angeles, California, as an

individual, was doing business at No. 1326 South Main Street, in the City of Los Angeles, under the name and style, Bethlehem Motors Company of Southern California, a fictitious name, and such was duly advertised, recorded and registered as provided and required by sections 2466, and 2468 of the Civil Code of the State of California.

“That commencing with the month of July, and afterward, during said year of 1919, said R. C. Klepper was engaged in the business of selling Automobile Trucks.

“That the Bethlehem Motors Corporation, a corporation having its offices and place of business at Allentown in the State of Pennsylvania, was prior to and during said year of 1919, a manufacturer of Automobile Trucks, at Allentown Pennsylvania, and as such issued an illustrated Catalogue and price list, to dealers in automobile trucks.

“That said catalogue illustrated and listed Chassis, complete in all its details and accessories, engine, radiator, clutches, transmission, electric starting and lighting, ready for the road.

“That said Bethlehem Motors Corporation, manufacture and also issued separate catalogue and price list of truck bodies, giving price of bodies, separate and apart from the catalogue and price list of Chassis. That such bodies consist of iron braced, wood frame structures, both with and without tops.

“That said Bethlehem Motors Company, and many other companies and individuals, sell chassis, separate

from the body and sell bodies separate from the chassis.

"That the Weber Auto Body and Traylor Works, located at 688 North Spring Street, City of Los Angeles, State of California, manufacture Auto Truck Bodies, for the trade during the year 1919, and since, listing various designs, and said Weber Auto Body and Traylor Works did not manufacture the chassis or any chassis or part thereof, for use in Auto Trucks, their business being solely manufacturers of bodies for automobiles and motor trucks.

"That from July to November 1st, 1919, said R. C. Klepper bought said Bethlehem Motors Corporation Seven Chassis, and said Bethlehem Motors Corporation, manufactured and produced said Chassis, complete, and shipped the same to Los Angeles, and after *receiving* said trucks, said R. C. Klepper sent the same over to the works of the Weber Auto Body and Traylor Works, at its factory and workshops, and then purchased from said Weber Auto Body and Traylor Works, seven bodies for the said seven Chassis, and said Weber Auto Body and Traylor Works, manufactured and produced said truck bodies and placed them upon the aforesaid Chassis.

"That said R. C. Klepper paid the War Tax of three per centum on the price paid to the Bethlehem Motors Corporation, to said Corporation, amounting to \$385.19, and paid to said Weber Auto Body and Traylor Works, the War tax of five per centum on the price paid them for said bodies, amounting to the sum of \$49.25.

“That said R. C. Klepper sold said Motor Trucks, together with said bodies thereon, for the total sum of \$22,015.05.

“That the Collector of Internal Revenue, John P. Carter, demanded of and compelled said R. C. Klepper to pay war tax of three per centum, based on said gross sales price aforesaid, less the War tax paid to the manufacturer of the Chassis and the manufacturer of the bodies, which amount so paid by said R. C. Klepper to said John P. Carter amounted to \$297.19.

“That during the month of November, 1919, said R. C. Klepper purchased four Chassis, from the same party and in the same form, and purchased four bodies from said Body Works under the same circumstances; that said Klepper paid to the Bethlehem Motors Corporation, war tax on said purchase, the sum of \$172.58, and paid to said Body Works, the sum of \$24.50.

“That said R. C. Klepper sold said auto trucks, together with said bodies thereon for the total sum of \$9,776.25.

“That the Collector of Internal Revenue, John P. Carter, demanded of and compelled said R. C. Klepper, to pay War tax of three per centum, based upon the said gross sales price, aforesaid, less the amounts paid to the manufacturer of the Chassis and the manufacturer of the bodies, which amount so paid by said R. C. Klepper to said John P. Carter amounted to \$108.21

"That during the month of December, 1919, said R. C. Klepper purchased two Chassis from the same party and in the same form, and purchased two bodies from the same Body Works, under the same circumstances; that said Klepper paid to the Bethlehem Motors Corporation war tax on said purchase, the sum of \$99.34, and paid to said Body Works, war tax in the sum of \$18.75.

"That said R. C. Klepper sold said two auto trucks, together with the bodies thereon for the total sum of \$5915.00.

"That the Collector of Internal Revenue, John P. Carter, demanded of and compelled said R. C. Klepper to pay war tax of three per centum, based upon the gross sales price aforesaid, less the amounts paid to the manufacturer of the *Chasis* and the manufacturer of the Bodies, which amount so paid by said R. C. Klepper to said John P. Carter, amounted to the sum of \$58.75.

"That said R. C. Klepper duly filed and presented application for Abatement of said taxes in manner and for as by the Regulations established by the Secretary of the Treasury in such cases made and provided, and said application was denied. That after payment of said taxes said R. C. Klepper duly filed and presented, in manner and form required by the Regulations so established, a "Claim for Refund" of said tax, claimed by him, the said R. C. Klepper to have been erroneously and illegally collected, and said Claim for Refund was by the Commissioner of In-

ternal Revenue, rejected by letter of date August 20th, 1920, the original of which is herewith exhibited for consideration by the Court, of which the following is a copy:

"Office of
COMMISSIONER OF INTERNAL REVENUE

TREASURY DEPARTMENT
WASHINGTON

Address Reply to August 20, 1920
Commissioner of Internal Revenue
And Refer To
ST-DSB.

Cls. 77506, 77469 & 77472-Rej.
Bethlehem Motors Company of Southern California,
1326 South Main Street,
Los Angeles, Calif.

Gentlemen:

Your three claims numbered 77506, 77469 and 77472 for the refund of \$297.19, \$58.77 and \$108.21 respectively, tax paid on the sales of automobiles, have been carefully considered.

From the evidence submitted, it appears that all of these taxes were paid by you on the sale of automobile trucks; that you purchased the chassis from the manufacturer and afterward you caused another manufacturer to build a body and place it upon each chassis; and then you sold the completed trucks to your customers.

You are advised that you are a manufacturer within the meaning of the law and are liable for the tax on the completed trucks when sold, less the amount of any tax on the chassis and bodies which you reimbursed to the manufacturers of these parts.

These taxes were properly paid and therefore your claims are rejected.

Your receipts for these taxes are returned herewith.

Respectfully,

Wm. M. Williams

Commissioner.

MEP

cc Los Angeles, Calif,

Incl-8293

"That said R. C. Klepper, in manner and form and according to the provisions of law in that regard, and the Regulations of the Secretary of the Treasury, established in pursuance thereof, duly appealed to the Commissioner of Internal Revenue from the denial and rejection of said Claims of R. C. Klepper, and relief on appeal was denied.

Robert O'Connor

United States Attorney
By Milton Bryan Asst Dis. Atty

Hocker and. Austin

Attorneys for R. C. Klepper."

[Endorsed]: "Filed Sept 27 - 1921 Chas. N. Williams Clerk By Edmund L. Smith, Deputy Clerk"

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

R. C. KLEPPER, doing business)	
under the fictitious name of)	
Bethlehem Motors Co.,)	
Plaintiff)	
vs.)	STIPULATIONS
)
JOHN P. CARTER, Collector of)	
Internal Revenue, Southern Dis-)	
trict of California,)	
Defendant.)	

IT IS HEREBY STIPULATED:

That the following shall be inserted in the Plaintiff's Proposed Bill of Exceptions, in the above entitled cause:

"That the Exhibits attached to the Supplemental Stipulations, filed in this cause, of date February 10th, 1922, being photographic copies of the records in the Interior Department were deemed by the court as detail of the agreed Statement of Facts, theretofore filed herein, and immaterial and the same were not considered by the court in determining this cause; but being willing that the Appellate Court should be fully advised in the premises, IT IS ORDERED that said photographic copies become a part of the Record in this cause, and said original Exhibits and not copies thereof, be transmitted to the Appellate Court, with

the Transcript and return to the Writ of Error in said cause."

Hocker and Austin
Attorneys for Plaintiff,
Robert B. Camarillo,
Asst U. S. Atty
Attorneys for Defendant.

TO: United States Attorney, as Attorney for the Defendant above named,

Pursuant to a suggestion of the court in the settlement of the Bill of Exceptions in this cause we hereby tender to you the foregoing stipulation.

April 27th, 1922.

Hocker and Austin
Attorneys for Plaintiff.

[Endorsed]: FILED Apr 27 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

R. C. KLEPPER,)	
doing business under fictitious :)	
name of BETHLEHEM MO-	)	No. 850-Civil.
TORS COMPANY,)	
	)	ORDER
	)	EXTENDING
vs.	)	TIME FOR
	)	BILL OF
JOHN P. CARTER,	)	EXCEPTIONS.
Collector of Internal Revenue :)	
SOUTHERN DISTRICT OF))	
CALIFORNIA,)	
)	
Defendant.)	

That on Monday, the 27th day of March, 1922, in open court it was ordered that the plaintiff may have sixty days from and after said date in which to prepare, serve and file a proposed Bill of Exceptions in said case.

“STIPULATION”

It is STIPULATED by and between the parties hereto that the above and foregoing Bill of Exceptions may be signed and settled as the Bill of Exceptions in this cause.

Dated April , 1922.

J. W. Hocker

Robert E. Austin

Attorneys for Plaintiff

Attorneys for Defendant.

The foregoing Bill of Exceptions contains all of the evidence offered and introduced at the trial of this cause, necessary to a review of the said cause on Writ of Error, and is a true and correct Bill of Exceptions, and the time for filing plaintiff's proposed Bill of Exceptions and defendant's amendment thereto and for settling of said Bill of Exceptions having been duly extended by the Court, said Bill of Exceptions is hereby settled and allowed and ordered filed. Consideration of the evidence of this cause made it necessary to review the said cause on Writ of Error.

Dated this 27th day of April, 1922.

Trippet

Judge.

[Endorsed]: No. 850 - Civil IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT. R. C. KLEPPER, doing business under fictitious name of BETHLEHEM MOTORS COMPANY, Plaintiff, vs JOHN P. CARTER, Collector of Internal Revenue SOUTHERN DISTRICT OF CALIFORNIA Defendant. BILL OF EXCEPTIONS. Received copy of the within Bill of Exceptions this 6th day of April, 1922. Robt B Camarillo Attorneys for Defendant. Lodged Apr 21 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk Settled Bill FILED Apr 27 1922 CHAS. N. WILLIAMS, Clerk By Edmund L. Smith Deputy Clerk Hocker & Austin Attys-aLaw 829 L. A. Stock Exchange Bldg., Los Angeles, Calif. Bdwy. 1236.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF CALIFORNIA

-- oOo --

R. C. KLEPPER,)	
doing business under fictitious	(
name of BETHLEHEM MO-)	
TORS CO.	(
)	
Plaintiff,	(
	)	STIPULATIONS
vs.	(	AND AGREED
	)	STATEMENT
JOHN P. CARTER,	(	OF FACTS
Collector of Internal Revenue)	
SOUTHERN DISTRICT OF	(
CALIFORNIA,)	
Defendant,	(
)	
		-- oOo --

It is hereby stipulated by and between J. W. Hocker, and Robert E. Austin, Attorneys for the plaintiff, and the United States Attorney, Attorney for the defendant, that the above entitled cause may be submitted to the decision of the Court upon the following statement of facts:

That during the year 1919, R. C. Klepper, a resident of the City of Los Angeles, California, as an individual, was doing business at No. 1326 South Main Street, in the City of Los Angeles, under the name and style, Bethlehem Motors Company of Southern California, a fictitious name, and such was duly advertised, recorded and registered as provided and

required by Sections 2466, and 2468, of the Civil Code of the State of California,

That commencing with the month of July, and afterward, during said year of 1919, said R. C. Klepper, was engaged in the business of selling Automobile Trucks.

That the Bethlehem Motors Corporation, a corporation having its offices and place of business at Allentown in the State of Pennsylvania, was prior to and during said year of 1919, a manufacturer of Automobile Trucks, at Allentown Pennsylvania, and as such issued an illustrated Catalogue and price list, to dealers in automobile trucks.

That said catalogue illustrated and listed Chassis, complete in all its details and accessories, engine, radiator, clutches, transmission, electric starting and lighting, ready for the road.

That said Bethlehem Motor Corporation, manufacture and also issued separate catalogue and price list of truck bodies, giving price of bodies, separate and apart from the catalogue and price list of Chassis. That such bodies consist of iron braced, wood frame structures, both with and without tops.

That said Bethlehem Motors Company, and many other companies and individuals, sell chassis, separate from the body and sell bodies separate from the chassis.

That the Weber Auto Body and Trailer Works, located at 688 North Spring Street, City of Los Angeles, State of California, manufacture Auto Truck Bodies,

for the trade, during the year 1919, and since, listing various designs, and said Weber Auto Body and Trailor Works, did not manufacture the chassis, or any chassis or part thereof for use in Auto Trucks, their business being solely manufacturers of Bodies for Automobiles and Motor Trucks.

That from July to November 1st, 1919, said R. C. Klepper bought of said Bethlehem Motors Corporation Seven Chassis, and said Bethlehem Motors Corporation, manufactured, and produced said Chassis, complete, and shipped the same to Los Angeles, and after receiving said trucks, said R. C. Klepper sent the same over to the works of the Weber Auto Body and Trailor Works, at its factory and workshops, and then purchased from said Weber Auto Body and Trailor Works, seven bodies for the said seven Chassis, and said Weber Auto Body and Trailor Works, manufactured and produced said truck bodies and placed them upon the aforesaid Chassis.

That said R. C. Klepper, paid the War Tax, of three per centum on the price paid to the Bethlehem Motors Corporation, to said Corporation, amounting to \$385.19, and paid to said Weber Auto Body and Trailor Works, the War tax, of five per centum, on the price paid them for said Bodies, amounting to the sum of \$49.25.

That said R. C. Klepper, sold said Motor Trucks, together with said bodies, thereon, for the total sum of \$22,015.05.

That the Collector of Internal Revenue, John P. Carter, demanded of and compelled said R. C. Klepper, to pay War Tax of three per centum, based on said gross sales price, aforesaid, less the War tax paid to the manufacturer of the Chassis and the manufacturer of the bodies, which amount so paid by said R. C. Klepper to said John P. Carter amounted to \$297.19.

That during the month of November, 1919, said R. C. Klepper purchased Four Chassis, from the same party and in the same form, and purchased four bodies, from said Body Works, under the same circumstances; That said Klepper paid to the Bethlehem Motors Corporation, war tax on said purchase the sum of \$172.58, and paid to said Body Works, the sum of \$24.50.

That said R. C. Klepper, sold said auto trucks, together with said bodies thereon for the total sum of \$9,776.25.

That the Collector of Internal Revenue, John P. Carter, demanded of and compelled said R. C. Klepper, to pay War tax of three per centum, based upon the said gross sales price, aforesaid, less the amounts paid to the manufacturer of the Chassis and the manufacturer of the bodies, which amount so paid by said R. C. Klepper to said John P. Carter amounted to \$108.21.

That during the month of December 1919, said R. C. Klepper purchased two Chassis from the same party and in the same form, and purchased two bodies from the same Body Works, under the same circumstances;

that said Klepper paid to the Bethlehem Motors Corporation, War tax on said purchase, the sum of \$99.34, and paid to said Body Works, War tax in the sum of \$18.75.

That said R. C. Klepper, sold said two auto trucks, together with the bodies thereon for the total sum of \$5915.00.

That the Collector of Internal Revenue, John P. Carter, demanded of and compelled said R. C. Klepper to pay War tax of three per centum, based upon the gross sales price aforesaid, less the amounts paid to the manufacturer of the Chassis and the manufacturer of the Bodies, which amount so paid by said R. C. Klepper to said John P. Carter, amounted to the sum of \$58.75.

That said R. C. Klepper, duly filed and presented application for Abatement of said Taxes in manner and form as by the Regulations established by the Secretary of the Treasury in such cases made and provided, and said application was denied. That after payment of said Taxes, said R. C. Klepper, duly filed and presented, in manner and form required by the Regulations so established, a "Claim For Refund" of said Tax, claimed by him, the said R. C. Klepper, to have been erroneously and illegally collected, and said Claim For Refund, was by the Commissioner of Internal Revenue, rejected, by letter of date August 20th 1920, the original of which is herewith exhibited, for consideration by the Court, of which the following is a copy:

Office of
COMMISSIONER OF INTERNAL REVENUE
TREASURY DEPARTMENT
WASHINGTON

August 20, 1920

Address Reply to
Commissioner of Internal Revenue
And Refer To
ST-DSB.

Cls. 77506, 77469 & 77472-Rej.
Bethlehem Motors Company of Southern California,
1326 South Main Street,
Los Angeles, Calif.

Gentlemen:

Your three claims Numbered 77506, 77469 and 77472, for the refund of \$297.19, \$58.77 and \$108.21, respectively, tax paid on the sales of automobiles, have been carefully considered.

From the evidence submitted, it appears that all of these taxes were paid by you on the sale of automobile trucks; that you purchased the chassis from the manufacturer and afterward you caused another manufacturer to build a body and place it upon each chassis; and then you sold the completed trucks to your customers.

You are advised that you are a manufacturer within the meaning of the law and are liable for the tax on the completed trucks when sold, less the amount of any tax on the chassis and bodies which you reimbursed to the manufacturers of these parts.

These taxes were properly paid and therefore your claims are rejected.

Your receipts for these taxes are returned herewith.

Respectfully,

Wm. M. Williams

Commissioner.

MEP

cc Los Angeles, Calif.

Incl-8293.

That said R. C. Klepper, in manner and form and according to the provisions of law in that regard, and the Regulations of the Secretary of the Treasury, established in pursuance thereof, duly appealed to the Commissioner of Internal Revenue from the denial and rejection of said Claims of R. C. Klepper, and relief on appeal was denied.

Robert O'Connor

United States Attorney

By Milton Bryan, Asst. U. S. Atty.

J. W. Hocker and Robert E. Austin

Attorneys for R. C. Klepper

[Endorsed]: No. 850 - Civil R. C. Klepper, etc
vs. John P. Carter, Collector of Internal Revenue etc.
Agreed Statement of Facts FILED Sept 27 1921
CHAS. N. WILLIAMS, Clerk By Edmund L. Smith
Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

R. C. KLEPPER,)	
doing business under fictitious name :		
of BETHLEHEM MOTORS)	No. 850-Civil.	
COMPANY,	:	
)	
	Plaintiff,	: PETITION
	)	FOR WRIT OF
vs.	:	ERROR.
)	
JOHN P. CARTER,	:	
Collector of Internal Revenue)		
SOUTHERN DISTRICT OF :		
CALIFORNIA,)	
	:	
	)	Defendant.

The plaintiff, R. C. Klepper, doing business under the fictitious name of Bethlehem Motors Company, feeling himself aggrieved by the decision and judgment of the Court, entered on the day of April, 1922, comes now by his attorneys, Hocker & Austin, and files herewith an Assignment of Errors and hereby petitions said Court for an Order allowing said plaintiff to procure a Writ of Error to the Honorable, the United States Circuit Court of Appeals, for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and that upon the filing of said Writ of Error in the clerk's office of the United States District Court for

the Southern District of California, Southern Division, at Los Angeles, California, all further proceedings in this Court be suspended and stayed, until the termination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will every pray.

Dated April 21", 1922.

J W Hocker

Robert E. Austin

Attorneys for Plaintiff.

[Endorsed]: No.-850 Civil R. C. Klepper etc, Plaintiff vs. John P. Carter, etc, Defendant, PETITION FOR WRIT OF ERROR. Received copy of within this 21st day of April 1922 Jos. C. Burke U. S. Attorney Per Robt B Camarillo Asst FILED Apr 21 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy Clerk

In The District Court of the United States, District of California Southern Division, at Los Angeles.

R. C. Klepper, doing business under fictitious name of Bethlehem Motors Company, Plaintiff vs. John P. Carter, Collector of Internal Revenue, Southern District of California, Defendant No. 850 - Civil

COST BOND ON WRIT OF ERROR

KNOW ALL MEN, By These Presents:

That we the National Surety Company, a corporation under the laws of the State of New York, are held and firmly bound unto John P. Carter, Collector

of the Internal Revenue, Southern District of California, and his successors in office, in the full and just sum of Two Hundred and Fifty Dollars, to be paid to the said John P. Carter, Collector of Internal Revenue, Southern District of California, and to his successor or successors in office, or assigns, to which payment, well and truly to be made we bind ourselves, our successors jointly and severally by these presents.

Sealed with our seal, and the Seal of said corporation, and dated this 28th day of April 1922.

Whereas, lately at the January term of the United States District Court, in and for the Southern District of California, Southern Division, at Los Angeles, in a suit depending in said court between R. C. Klepper, doing business under fictitious name of Bethlehem Motors Company, plaintiff and John P. Carter, Collector of Internal Revenue, Southern District of California, defendant, judgment was rendered against the said R. C. Klepper, plaintiff above named, and the said plaintiff has obtained a Writ of Error, directed to said Court, to reverse the judgment in the aforesaid suit and a citation directed to the said John P. Carter, Collector of Internal Revenue, Southern District of California, citing and admonishing said defendant to be and appear in the United States Circuit Court of Appeals, for the Ninth Circuit at the City of San Francisco, California, thirty days from and after the date of said citation;

Now, The condition of the above obligation is such that if the said R. C. Klepper, plaintiff above named,

shall prosecute said Writ of Error, to effect and answer all costs, if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

NATIONAL SURETY COMPANY

By Catesby C Thom

ITS ATTORNEY IN FACT.

Examined and recommended for approval as provided in rule 29,

J. W. Hocker

Attorney.

I hereby approve the foregoing bond, dated this 28 April A. D. 1922.

Trippet

STATE OF CALIFORNIA)
) ss
 County of Los Angeles,)

On this 28th day of April in the year one thousand nine hundred and 22, before me MYRTLE E. DITTMAN, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared CATESBY C. THOM, known to me to be the duly authorized Attorney in Fact of NATIONAL SURETY COMPANY, and the same person whose name is subscribed to the within instrument as the Attorney in Fact of said Company, and the said CATESBY C. THOM, acknowledged to me that he subscribed the name of NATIONAL SURETY COMPANY thereto as principal, and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Myrtle E. Dittman

Notary Public in and for Los Angeles County, State of California.

[Attorney in Fact]

(Seal)

[Endorsed]: No. 850- Civil. R. C. Klepper, doing business under fictitious name, Bethlehem Motors Co. Plaintiff vs. John P. Carter, Collector Internal Revenue, Southern District California, Defendant BOND ON WRIT OF ERROR FILED Apr 28 1922 CHAS. N. WILLIAMS clerk By R S Zimmerman Deputy Clerk

UNITED STATES OF AMERICA

District Court of the United States
SOUTHERN DISTRICT OF CALIFORNIA

R. C. Klepper, doing business under the fictitious name of Bethlehem Motor Company, Plaintiff	}	CLERK'S OFFICE.
John P. Carter, Collector Internal Revenue, Southern District California, Defendant		No. 850-Civil
	}	PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please issue Certified Transcript of the Record on Writ of Error, to contain the following:

Amended Complaint,

Answer

Judgment

Bill of Exceptions

Agreed Statement of Facts, filed September 27th,
1921

Petition for Writ of Error,

Assignment of Errors

Writ of Error, together with endorsement of allow-
ance thereof

Citation, with endorsement of service

Bond on Writ of Error, and of

This Praecipe.

Your attention is respectfully called to the Bill of Exceptions, at page 5½, thereof, ordering certain Photographic copies attached to Supplemental Stipulations, filed February 10th, 1922, be transmitted to the Appellate Court ---

You are requested that the original Copies, as referred to, be transmitted to the Circuit Court of Appeals, with the Transcript in this cause, as well as the original of the Writ of Error, and Citation.

J. W. Hocker and

Robert E. Austin

Attorneys for Plaintiff

[Endorsed]: No. 850 - Civil U. S. District Court
SOUTHERN DISTRICT OF CALIFORNIA R. C. Klepper,
doing business under the fictitious name Bethlehem
Motor Company, Plaintiff vs John P. Carter, Collector
Internal Revenue, Southern District California. De-
fendant. PRAECIPE FOR Transcript of Record,
FILED Apr 29 1922 CHAS. N. WILLIAMS, Clerk.
By Edmund L. Smith Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

R. C. KLEPPER, doing business)	
under the fictitious name of Beth-)	
lehem Motor Company,)	
Plaintiff,)	
vs.)	CLERK'S
JOHN P. CARTER, Collector In-)	CERTIFICATE.
ternal Revenue, Southern District)	
California,)	
Defendant.)	

I, CHAS. N. WILLIAMS, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 42 pages, numbered from 1 to 42 inclusive, to be the transcript of record on writ of error in the above entitled cause, as printed by plaintiff in error, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, amended complaint, answer, judgment, bill of exceptions, agreed statement of facts, filed Sept. 27th, 1921, petition for writ of error, assignment of errors, writ of error, together with endorsement of allowance thereof, bond on writ of error and praecipe.

I DO FURTHER CERTIFY that the fees of the clerk for comparing, correcting and certifying the foregoing record on writ of error amount to

and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-sixth.

CHAS. N. WILLIAMS,

Clerk of the District Court of the
United States of America, in and
for the Southern District of California.

By

Deputy.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

R. C. Klepper, doing business under
the fictitious name of Bethlehem
Motor Company,

Plaintiff in Error,

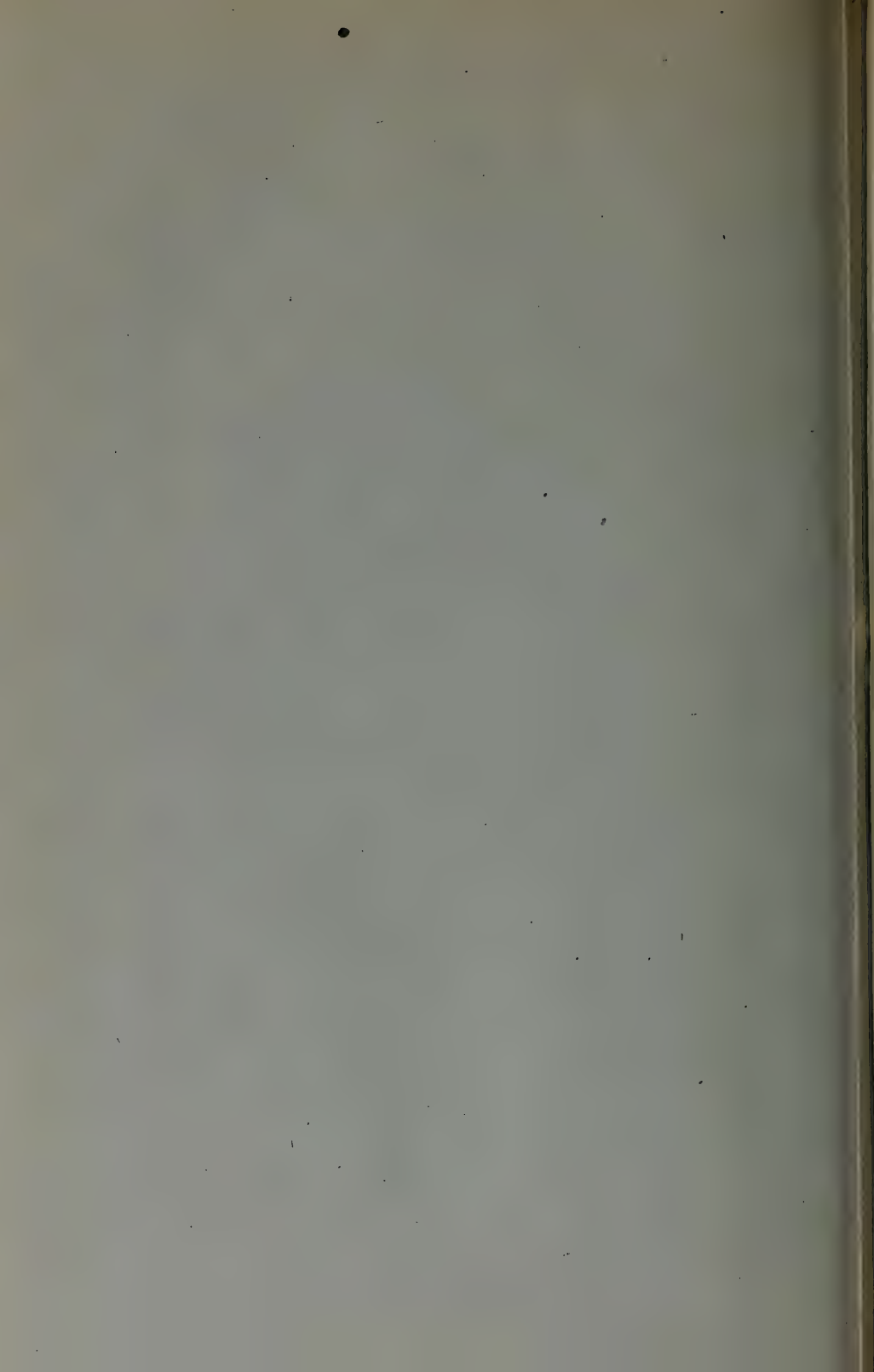
vs.

John P. Carter, Collector of Internal
Revenue, Southern District of Cali-
fornia,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

J. W. HOCKER and
ROBERT E. AUSTIN,
Attorneys for Plaintiff in Error.



No. 3887.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

R. C. Klepper, doing business under
the fictitious name of Bethlehem
Motor Company,

Plaintiff in Error,

vs.

John P. Carter, Collector of Internal
Revenue, Southern District of Cali-
fornia,

Defendant in Error.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

By Act of Congress, approved February 24th, 1919,
chapter 18, section 900, it is enacted:

“There shall be levied, collected and paid upon
the following articles sold or leased by the manu-
facturer, producer or importer, a tax equivalent
to the following percentages of the price for
which so sold or leased—

“(1) Automobile trucks and automobile wagons
(including tires, inner tubes, parts and accessories

therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

* * * * *

“(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;”

(The foregoing was an amendment to Act of Congress, approved October 3rd, 1917, 40 Statutes at Large, 316, Sec. 600.)

(This Act of Congress was further amended by Act of November 23rd, 1921, chapter 136, Sec. 900, 42 Statutes at Large, but such amendment nor the regulations promulgated thereunder, in no manner affects the case at bar.)

The plaintiff in error, was a dealer in automobile trucks, during the year 1919 (commencing business July 1st, 1919) at Eighteenth and Main streets, city of Los Angeles, California, and maintained a sales room and office at said place, but did not own, operate or maintain nor was interested in either an assembling plant or place for the repair of automobile trucks; being engaged solely in the business of buying and selling automobile trucks.

The Bethlehem Motors Corporation, a corporation of Allentown in the state of Pennsylvania, was a manufacturer of automobile trucks, bodies and accessories thereto, selling automobile trucks both, with and without bodies, and issued printed, illustrated cata-

logues and price lists of bodies, separate from their catalogue of automobile trucks.

The Weber Auto Body and Trailer Works, located at 688 North Spring street, in the city of Los Angeles, was engaged in the manufacture of automobile and automobile truck bodies, and issued an illustrated catalogue and price list of many designs of bodies, therefore, but was not engaged in the manufacture of automobile trucks or chassis.

That said Bethlehem Motor Corporation, as well as many such companies manufacture and sell automobile truck chassis, separate from the body, and sell the body separate from the chassis, as well as assembled.

That during the year 1919, plaintiff in error, purchased thirteen automobile trucks from said Bethlehem Corporation, equipped with cabs, and complete and ready for the road, but did not purchase bodies for said automobile trucks, from said Bethlehem Motors Corporation, but did purchase bodies for said automobile trucks, from said Weber Auto Body and Trailer Works, as needed; the user, selecting the design thereof from the said illustrated catalogue and price list of said Weber Company, and said Weber Company fitted said bodies to said chassis, at the plant of said Weber Company, in the due course of business of said Weber Company.

The truck with the body, then being delivered to the user and not returned to the salesroom or warehouse of plaintiff in error.

The Bethlehem Corporation, paid the war tax, on the 13 automobile trucks, at three per centum on the price for which the same were sold to plaintiff in error, and added the amount of the tax, by separate item in the invoice, to the invoice price and plaintiff in error paid to said Bethlehem Corporation, the amount of such tax.

The Weber Company paid the war tax on the thirteen bodies, at five per centum of the price for which the bodies were sold to plaintiff in error, and added the amount of the tax, by separate item in the invoice to the invoice price and plaintiff in error paid to said Weber Company, the amount of such tax.

The defendant in error is the Internal Revenue Collector, and as such demanded of and compelled plaintiff in error, to report and pay additional war tax of three per centum, as a manufacturer, on the gross sales price, for which plaintiff in error sold the automobile trucks to his customer, adding penalties for failure of plaintiff in error to report such tax, as a manufacturer but, deducting the amount of tax so paid by plaintiff in error, to the manufacturers, the Bethlehem Corporation and the Weber Company.

Such payment was fixed by the defendant in error, as three distinct items, the first: On seven trucks amounting to \$297.19, and second: On four trucks amounting to \$108.21 and the third: On two trucks, amounting to \$58.77.

Plaintiff in error filed applications for abatement of the tax, and then, after payment, filed claim for re-

fund, and in manner and form according to the provisions of law and the regulations promulgated by the secretary of the treasury, in that regard, duly appealed to the Commissioner of Internal Revenue, and relief being denied upon such appeal, filed this suit to recover the moneys so wrongfully exacted and paid.

For the purposes of trial, the attorneys for plaintiff in error and for the defendant in error, made an agreed statement of facts and, upon stipulation, the cause was tried to the court upon such stipulated facts.

Judgment was rendered against plaintiff in error, and plaintiff in error brings the case to this Honorable Court by writ of error.

The agreed statement of facts is brought properly into the record by bill of exceptions settled, allowed and filed in the cause, and this statement of the case conforms to said agreed statement of facts appearing in the printed transcript in this cause, at pages 28 *et seq.* and also incorporated in the bill of exceptions appearing at pages 17 *et seq.* of the transcript.

Specifications of Error.

I.

The decision of the court is not sustained by sufficient evidence.

II.

The decision of the court is contrary to the evidence.

III.

The decision of the court is contrary to law.

ARGUMENT.

The complaint is in three counts, inasmuch as the Collector of Internal Revenue, arbitrarily divided his demands for taxes into three several demands for payment, as shown by the complaint.

The first for the balance of \$108.21. [Vide p. 6, Tr.]

The second for the balance of \$297.19. [Vide p. 8, Tr.]

The third for the balance of \$58.77. [Vide p. 9, Tr.]

The sole question is as to whether or not plaintiff in error was a MANUFACTURER, for the statute only includes manufacturer, producer and importer.

The terms, manufacturer and producer, in the sense used are synonymous.

The lexicographer gives us the following:

“PRODUCER—

“(1) One who produces, brings forth or generates.

“(2) One who grows agricultural products or manufactures crude materials into articles of use.”

The word MANUFACTURER is defined thus:

“(1) To make (wares or other products) by hand, by machinery or by other agency; as to manufacture cloth, nails, glass, etc.

“(2) To work, as raw or partly wrought materials into suitable forms for use; as, to manufacture wool, cotton, silk or iron.”

In *Lake v. Guillott*, 19 Southern Reporter, the Louisiana court held that to assemble imports, *i. e.*, the handle, the frame and the cover of umbrellas and parasols, all manufactured abroad, did not constitute a manufacturer, notwithstanding such importer placed thereon ferrules and the snaps necessary to hold the umbrella extended."

"MANUFACTURE is distinguishable from MECHANIC OR TRADESMAN, and has been held, under statute, to be identical with PRODUCER."

26 Cyc. p. 527.

Plaintiff in error is a TRADER, under the definition as set forth *In re Kingston Realty Company*, 160 Fed. Rep. 445-447.

In the case of *Tidewater Oil Company v. United States*, 171 U. S. 210, we find the definition of the word "*manufacturer*." In that case the Tidewater Oil Company, purchased (in Canada), shaped shooks, from which to make the sides, ends, tops and bottoms of certain boxes or packing cases; these shaped shooks were bundled and shipped to New Jersey and there, with nails manufactured in the United States, from rods imported from England, formed into boxes or packing cases.

The Supreme Court held that such boxes were NOT manufactured in the United States.

In *Tidewater Oil Company* case, the mere assembling did not constitute a manufacture.

To the same effect:

Cate v. Connell, 173 Fed. 445-447;

Hall & Kaul v. Friday, 158 Fed. 593;

Re T. E. Hill Co., 148 Fed. 832;

Re First Bank of Bell Fourche, 152 Fed. 64.

The foregoing cases accept the definition of the lexicographer, and we submit that Congress used the terms in the sense of their common acceptance.

In the case at bar it is stipulated that the '*chassis*' is the automobile truck, complete, ready for the road. [Vide Tr. p. 18.]

That plaintiff in error bought from the Bethlehem Motors Corporation said chassis complete. [Vide Tr. p. 19.]

That the Weber Company manufactured and produced the automobile truck bodies and placed them on the chassis. [Vide Tr. p. 19.]

Counsel for defendant in error, in the argument in the District Court cited the construction of the Munitions Tax Act, and section 301 thereof by the United States Supreme Court, in the case of

Carbon Steel Company v. Lewellyn, 251 U. S. 501.

We will quote the statute, as quoted by the Supreme Court at pages 503-504:

"Sec. 301 (1) That every person manufacturing * * * (c) projectiles, shells, or torpedoes of any kind * * * or (f) any part of any of the articles mentioned * * * (c) * * *

shall pay for each taxable year, in addition to the income tax imposed by this Title I an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured in the United States."

In that case there is a wide distinction in the facts as well as the kind of tax imposed, from the facts of the case at bar.

The court say:

"It (the petitioner) was the contractor for the delivery of the shells, made the profits on them, and the profits necessarily reimbursed all expenditures on account of the shells. It was such profits that the act was intended to reach—profits made out of the war and taxed to defray the expense of the war. Or, as expressed by the Court of Appeals, Congress 'felt that the large abnormal profits incident to these war contracts created a remunerative field for temporary taxation.' Petitioner, it is true, used the services of others but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. And petitioner kept control throughout—never took its hands off, was at pains to express the fact, and retained its ownership of all of the materials furnished by it, and the completed shell belonged to it, until delivered to the British Government. And further, the steel furnished by it was advanced above a crude state—advanced to slugs. The nicking of it by an outside company we consider of no consequence, for

after nicking they were redelivered to petitioner and by it 'broken or separated' into slugs."

The statute is explained in the case as follows:

"The tax was on profits and measured by them
* * * the tax here in issue is the tax on the profits of the petitioner, not on the profits of the subcontractors." (Page 506.)

At the argument in the District Court, counsel for defendant in error referred to a construction of the Act of Congress, approved October 3rd, 1917 (40 Stat. at Large 316, section 600) the present act being an amendment thereof.

Rech-Marbaker v. Lederer, Collector, 263 Fed. 593.

Later, Judge Dickinson, in the case of Foss-Hughes Co. v. Lederer says: "Congress, in a subsequent act, corrected this oversight."

The construction, as made in the case at bar, following the referred to construction of the older statute, in effect, would nullify the present statute, and evade the tax.

It is common knowledge that the manufacturer sent his manufactured chassis to market on its own wheels and power—during and since the war. A user buys one of these chassis, and builds a platform on the frame and, there being no "sale" of the completed automobile truck, there is no tax (?). Again: The user buys a chassis, and from another buys a body, and assembled,

it becomes a completed automobile truck. But, there being no sale as a completed truck, there is no tax (?).

Just a step further: The Bethlehem Company being manufacturers of both chassis and bodies, sells a chassis, to the user today and tomorrow sells the body to the user's hired hand, in good faith, and without knowledge that the body is to be used on the chassis so sold. The Department insists that, there being no completed automobile truck "*sold*," there is no tax (?).

The theory of the statute was that the "*manufacturer*" should pay the tax and, while in practice the user actually pays, this does not change the "*intent*" of the law-maker.

Plaintiff in error was not a manufacturer.

Respectfully submitted,

J. W. HOCKER and

ROBERT E. AUSTIN,

Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

R. C. Klepper, doing business under
the fictitious name of Bethlehem
Motors Company,

Plaintiff in Error,

vs.

John P. Carter, Collector of Internal
Revenue, Southern District of Cali-
fornia,

Defendant in Error.

DEFENDANT'S REPLY BRIEF.

FILED

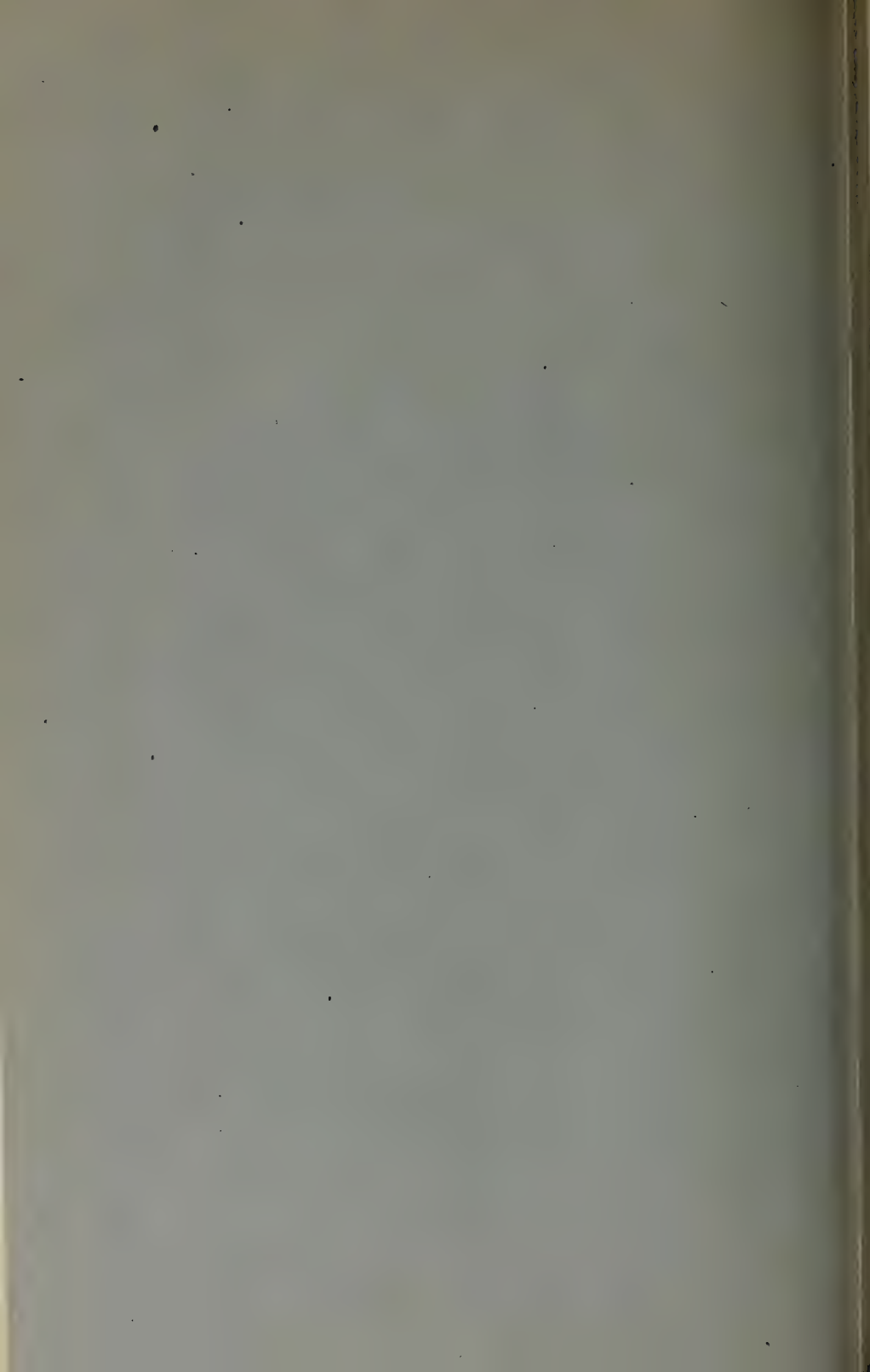
AUG 31 1922

F. D. MONCKTON,

CLERK

JOSEPH C. BURKE,
United States Attorney,

ROBERT B. CAMARILLO,
Assistant United States Attorney.



No. 3887.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

R. C. Klepper, doing business under
the fictitious name of Bethlehem
Motors Company,

Plaintiff in Error,

vs.

John P. Carter, Collector of Internal
Revenue, Southern District of Cali-
fornia,

Defendant in Error.

DEFENDANT'S REPLY BRIEF.

NATURE OF THE CASE.

This is an appeal from a judgment of the District Court in favor of the defendant. The plaintiff sought to recover certain moneys alleged to have been wrongfully exacted from him as an excise tax, the tax having been collected on the ground that the plaintiff was a manufacturer or producer of automobile trucks within the meaning of title IX, section 900 of the Revenue Act of 1918, and as such had manufactured, and dur-

ing the months of July, August, September, October, November and December, 1919, had sold certain automobile trucks.

STATEMENT OF FACTS.

The facts and circumstances out of which the tax liability, if any, arose, are substantially as follows:

From the first of July, 1919, to the end of the year, plaintiff was engaged in the business of selling automobile trucks at retail. The Bethlehem Motors Corporation, of Allentown, Pa., was, during the year 1919, a manufacturer of automobile trucks and as such issued an illustrated catalogue and price list to dealers in those articles. This catalogue illustrated and listed chassis complete in all details, with accessories, engine, radiator, clutch, transmission, electric starting and lighting. This company also manufactured automobile truck bodies and issued a separate catalogue and price list thereof, giving price of bodies separate and apart from the catalogue and price list of chassis. Such bodies consisted of iron braced wood frame structures, both with and without tops. This company and many other companies and individuals manufacture and sell chassis separate and apart from the body, and body separate and apart from the chassis. Few, if any, manufacturers make all parts of, and sell, complete automobile trucks. By complete automobile trucks is meant vehicles with bodies and cabs attached to chassis and ready for the road.

The Weber Auto Body and Traylor Works, Los Angeles, Cal., during the year 1919, manufactured automobile truck bodies for the trade, but did not manufacture a chassis or any part thereof for use in automobile trucks.

During the period from July 1, 1919, to the end of that year, plaintiff purchased from the Bethlehem Motors Corporation a number of automobile truck chassis, for each of which he paid a certain specified sum, and in addition thereto reimbursed the vendor for the amount of tax previously paid by the latter upon the manufacture and sale of said chassis under the provisions of section 900, of the Revenue Act of 1918. During the same period plaintiff also purchased from the Bethlehem Motors Corporation a number of automobile truck cabs. Subsequent to their purchase he took these chassis and cabs to the Weber Auto Body and Trailer Works and caused the latter to build a body for each chassis and assemble chassis, body, and cab into a complete automobile truck, for each of which he paid to the Weber concern a certain stipulated sum, and also reimbursed the Weber concern for the amount of tax paid by it on the said bodies, under the provisions of section 900, of the Revenue Act of 1918, and thereafter during the months of July to December, inclusive, of 1919, plaintiff sold these completed trucks to its customers, each for a stipulated price for a completed truck. See photostatic copy of "Claim for Refund" wherein it was stated by plaintiff:

“The facts pertaining to each transaction on which taxes have been claimed by the collector and paid by claimant are identical, to-wit: Claimant is the local sales agency for the Bethlehem Motors Company of Allentown, Pa., and buys and pays for completed automobile truck chassis. On each one the Bethlehem Motors Co., of Allentown, Pa., as manufacturer paid the tax required by the Revenue Act of 1918. In each case where the tax has been claimed (and paid) claimant’s customer has desired a body on the chassis, and claimant has taken the order for the body (as for the chassis) and has ordered the body to be built by the Weber Auto and Trailer Co., of Los Angeles, who have built, placed the body on the chassis and paid the manufacturer’s tax thereon, and sold it to claimant. The claimant has then in each case sold the chassis and body to the customer.”

The defendant, acting in his official capacity as Collector of Internal Revenue, demanded of the plaintiff, and the latter paid to him, a tax of three per centum of the price for which plaintiff sold the completed trucks, as aforesaid, less the amount of taxes previously paid and reimbursed by plaintiff to the Bethlehem Motors Corporation for the aforesaid chassis and the amount of tax which he had reimbursed the Weber concern. The collector claimed that said tax was due from plaintiff under and by virtue of the provisions of section 900 of the Revenue Act of 1918. Plaintiff filed claims for refund. The Commissioner of Internal Revenue rejected the same *in toto* and this suit is brought for the recovery of the amount so paid.

Assessments were made by the Commissioner of Internal Revenue against plaintiff for each of the sums collected from him as taxes. The assessments were not made, however, until some days after payment had been made by plaintiff. The taxes were paid voluntarily, without duress or protest.

THE STATUTES.

The pertinent provisions of the statute are as follows:

“Sec. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

“(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum:

“(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;”

“Sec. 903. That every person liable for any tax imposed by section 900, 902, or 906, shall make monthly returns under oath in duplicate and pay the taxes imposed by such sections to the collector for the district in which is located the principal place of business. Such returns shall contain such information and be made at such times and in such manner as the commissioner, with

the approval of the secretary, may by regulations prescribe.

“The tax shall, without assessment by the commissioner or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. If the tax is not paid when due, there shall be added as part of the tax a penalty of 5 per centum together with interest at rate of 1 per centum for each full month, from the time when the tax became due.”

The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, has promulgated the following regulations for the construction and enforcement of the act:

Regulations 47 (revised December, 1920):

“Art. 6. Credit for taxes already paid.—A manufacturer may take as a credit against the tax imposed on him in respect to the sale of any article taxable under section 900 an amount equal to any tax imposed under section 900 which he has reimbursed to the manufacturer from whom he purchased any article forming a component part (whether or not changed in form by process of manufacture) of the article sold by him and in respect to which tax is paid by him, provided the tax was billed to him as a specific item and in the exact amount of the tax. Credit is not allowed unless: (1) The article forms a component part of an article sold by such manufacturer and in respect to which a tax is payable by him; (2) such manufacturer has, in fact reimbursed the manufacturer from whom purchased,

who has himself, in fact, paid the tax upon which such credit is sought; (3) unless the taxpayer keeps such records and evidence as will clearly establish his right to the same. * * *

“Art. 7. Who is a manufacturer.—A manufacturer is generally a person who (1) actually makes a taxable article, or (2) by changes in the form of an article produces a taxable article, or (3) by the combination of two or more articles produces a taxable article. Under certain circumstances, however, the person who actually makes, produces, or assembles the taxable article is not the manufacturer for the purpose of the tax. There may be several stages of manufacture and several manufacturers, each of whom must pay a tax. In such cases the tax attaches on successive sales, subject to the provisions as to credits (see Art. 6). The following examples are merely illustrative:

* * * * *

“Example 2: ‘A,’ an automobile body manufacturer, sells an automobile body in a knock-down condition, but complete as to all its component parts, to ‘B,’ a dealer, who assembles these component parts into a complete usable automobile body, and installs it, or causes it to be installed on a chassis which he has purchased from a manufacturer who is a different person from the manufacturer of the body, and sells the completed automobile. ‘A’ is the manufacturer of the automobile body, but may sell the same to ‘B’ tax free under the certificate provided for in article 14. ‘B’ is the manufacturer of the automobile and subject to tax on the selling price of the

completed automobile, but may take credit for the amount of tax paid by the manufacturer of the chassis. (See Arts. 3 and 6.)”

“Art. 37. Return and payment of tax.—Each manufacturer of any of the articles hereinabove enumerated must make monthly returns under oath in duplicate and pay the taxes imposed on such articles to the collector of internal revenue for the district in which his principal place of business is located. Any return may, if the amount of the tax covered thereby is not in excess of \$10.00 be signed or acknowledged before two witnesses instead of under oath. The returns shall be made on Form 728 (revised). Instructions for preparing will be found on the back of the form. The returns are to be rendered and the tax paid on or before the last day of each month covering all the transactions of the preceding month, the first return to cover all transactions after February 24, 1919, and before April 1, 1919.

* * *

POINT I.

A Person Who Purchases an Automobile Truck Chassis and a Cab Separate and Apart Therefrom From the Manufacturer Thereof and Causes a Third Person, Who Is an Independent Contractor, to Build a Body and Assemble the Chassis, Body and Cab Into a Completed Automobile Truck, and Sells the Completed Truck, Has Both Manufactured and Sold an Automobile Truck Within the Meaning of Section 900 of the Revenue Act of 1918 and Is Subject to the Tax Levied Thereby.

Section 900 of the Revenue Act of 1918 provides that there shall be paid upon automobile trucks and automobile wagons (including parts, tubes, accessories, etc., sold on or in connection therewith, or with the sale thereof) sold by the manufacturer or producer, a tax equivalent to three per cent of the price for which the automobile trucks or automobile wagon is sold. It also provides that there shall be paid upon parts or accessories for automobile trucks or automobile wagons sold to any person other than a manufacturer or producer of automobile trucks or automobile wagons, by the seller of such parts or accessories, a tax equivalent to five per centum of the price for which such parts or accessories are sold. It is clear, therefore, that the person subject to tax under this act, upon automobile trucks or automobile wagons, is the person who both manufactures and sells them.

Rech-Marbaker Co. v. Lederer, Collector, 263 Fed. 593. In this case the tax was sought to be levied upon the manufacturer of an automobile body under the following circumstances:

The prospective user of an automobile truck purchased a chassis from one concern and caused the plaintiff to build a baker's wagon body and attach the same to the chassis. A tax of three per centum of the price received by plaintiff from the prospective user was collected. The plaintiff sought to recover that tax. It was levied under section 600, title VI, of the Revenue Act of 1917, the pertinent provisions of which read as follows:

“That there shall be levied, assessed, collected and paid—

“(a) Upon all automobiles, automobile trucks, automobile wagons, and motorcycles, sold by the manufacturer, producer, or importer, a tax equivalent to three per centum of the price for which so sold; * * *.”

The defendant contended that the tax was upon the manufacture, rather than upon the sale. The plaintiff argued that the tax was on both the manufacture and sale and that, as it had not sold a truck, it was not liable to the tax. In rendering judgment for the plaintiff, the court said:

“The tax imposed is an excise tax, to be paid by those who sell the things enumerated, and is measured by 3 per cent of the price for which the thing is sold. The general thought was to cover

power trucks, along with automobiles and motorcycles. The thought was expressed as simply as possible in the act by making the tax collectible 'upon all automobiles, automobile trucks, automobile wagons, and motorcycles, sold by the manufacturer, producer, or importer.' When applied to the sale of automobiles or motorcycles, the meaning of the act is entirely clear, and the act was doubtless framed with the common mode of sale transactions of this kind in the mind of the draftsman. The thought, however, is not clear in respect to automobile trucks, because there are none which are 'sold by manufacturers, producers, or importers,' and in consequence no transactions to which the taxing clauses or measuring clauses of the law can apply. This is because automobile trucks are never dealt in or sold by any 'manufacturer, producer, or importer' as units, nor are the parts ever assembled or dealt in as units. There is no such thing as a standard type of truck with which this case concerns itself. When the prospective user wants one, he buys a chassis and sends it, together with the kind of a body he wants, to some one to have the body put on, or he sends the chassis to have a body put on it. It is then returned to him as an automobile truck, but there has been no truck sold. There has been the sale of a chassis, or the sale of a body, or separate sales of each, but no sale of a truck, unless one or the other can be said to be a truck."

"* * * We dispose of it by the ruling that the Act of 1917 imposes no tax except the one measured by a sale of an automobile truck."

The portion of the 1917 Act construed in the Rech-Marbaker case and the section of the 1918 Act here in question are substantially the same.

The Plaintiff Is a Manufacturer or Producer Within the Meaning of the Act.

It is a matter of common knowledge that no person in the United States manufactures all the parts of an automobile truck or automobile wagon, assembles them, and sells a completed automobile truck or wagon. It is also a matter of common knowledge that complete automobile truck chassis are usually, if not always, manufactured by the same concern. This being true, there are only two classes of persons whom Congress could possibly have had in mind as manufacturers of completed trucks, and upon whom it levied the tax under subdivision (1) of section 900: The one class includes those persons who purchase chassis from the manufacturers thereof and themselves manufacture bodies and the other parts and accessories necessary to a completed truck, and assemble them into a completed article; the other class includes those persons who purchase chassis from the manufacturers thereof and cause what we may call independent contractors to manufacture the body and other parts necessary to a completed truck, and assemble the various parts into a completed truck. That those persons included in the first class are manufacturers of automobile trucks within the meaning of the act, there can certainly be no dispute, for if they are not, then

we have to suppose that Congress solemnly and for the very serious purpose of raising the revenue necessary to carry on the Government, has proceeded to levy a tax upon something which it knew, or should have known, does not exist, or upon persons, for the doing of certain acts, when it knew, or should have known, that no person does those acts. If we are correct in assuming that persons in the first class are subject to the tax, then we are necessarily correct in assuming that persons in the second class are also liable therefor. The fact that plaintiff, as one of those falling in the second class, himself did no physical work on the trucks, is immaterial. He caused such work to be done, and it was done by the Weber concern, for him. *Qui facit per alium facit per se*. The terms "manufacturer" and "producer" refer to one who causes an article to be made, as well as to the one who makes it. *Foss-Hughes Co. v. Lederer*, Collector, decided in the United States District Court for the Eastern District of Pennsylvania, May 17, 1920, —unreported to date; *Carbon Steel Co. v. Lewellyn*, 251 U. S. 501; *Forged Steel Wheel Co. v. Lewellyn*, 251 U. S. 511; *Hancock v. State*, 114 Ga. 439, 40 S. E. 317.

The *Foss-Hughes* case involved the same question of law and identically the same state of facts as is involved in this case. The decision was for the defendant. For the convenience of the court, as the case is as yet unreported, we copy the opinion of

Judge Dickinson (the same judge who decided the case of *Rech-Marbaker v. Lederer*, *supra*) in full:

“This is to all intents and purposes a case stated. The right to a jury trial was waived and the case came on to be heard without a jury. The parties then stipulated all the facts. There remains at most only an ultimate fact finding to be made under the evidentiary facts stipulated, or possibly only a question of law to be determined.

“The general situation presented is the Act of Congress of October 3rd, 1917, section 600, providing (*inter alia*) for the collection of a tax upon all automobile trucks sold by the manufacturer, producer, or importer thereof. There is no claim that the plaintiff imports and none that he is a manufacturer, except in the sense in which one who has something made for him by others to be sold by him may be said to be a manufacturer. This is doubtless the sense in which Congress used the word ‘producer,’ and was also doubtless the occasion for its use. The whole question would seem to be compressed in this one. Was the plaintiff a producer of automobile trucks?

“We are not concerned with collateral fact conditions directly but it serves to give us a grasp of the practical situation if we have in mind these other facts. One is that the tax law relates to sales of automobiles and motorcycles, as well as automobile trucks. Another is that in the administration of the law it was found that a great many sales of automobiles and motorcycles were made, but that sales of automobile trucks were

seldom made. This was because the usual course of business was for one man to make or import a chassis which he sold to the purchaser who had another man make the body which suited his purpose, or the purchaser put on the body himself. As a consequence, no one ordinarily manufactured, produced or imported an automobile truck, although there were numbers who dealt each in a part of the truck.

“Congress, in a subsequent act, corrected this oversight, but with the later act we are not now concerned. The real question before us is whether the plaintiff did not do for the purchaser what he usually had done for him by two persons and do this by producing and selling automobile trucks?

“What the purchaser wanted was a truck and to be saved the several purchases of a chassis and a body, and also of having the two made into a truck. The plaintiff supplied this need by itself purchasing the chassis from the maker and having the body added by some one engaged in that kind of work, and then selling the product as an automobile truck. The manufacturer of the chassis was a wholly independent contractor (if the phrase be an allowable one) and so likewise was the body builder. Unquestionably an automobile truck was produced. The maker of the chassis did not produce it nor did the manufacturer of the body. One of the three parties concerned was the producer (if there was one) and he must be the plaintiff. The only escape from this conclusion is that no one of them was the producer but it was a joint product of all. The taxpayer

is one who both produces and sells. This plaintiff admittedly sells, and it is through it that what it sells is brought into existence. The fact that personally it does not make chassis or body and does not even assemble is not controlling—*facit per alium facit per se*. The fact that the maker of the chassis and the maker of the body is each what the plaintiff calls an independent contractor is also aside from the mark.

“It may be stated in further explanation of the fact situation that the taxing department of the Government construed the Act of 1917 to authorize the levying of the tax on parts of a truck as well as on trucks. It may have been right or wrong in giving the act this meaning. It has been held that the manufacturer of a body only was not liable to pay a tax on the truck. *Rech-Marbaker v. Lederer*, March Sessions 1919. However this may be, what the department in practice did was to call the chassis an automobile truck and collect a tax on its sale; to also call the body a truck and collect a tax on its sale, and further to call the parts when assembled a truck and collect the tax on the sale of the truck. Allowance was made, however, by deduction in each instance for the tax previously paid.

“The present action is to recover the tax paid by plaintiff on the basis that it was unlawfully assessed, and this question of the legal propriety of its payment is the only question raised.

“Judgment may be entered for defendant, with costs.”

In the case of *Carbon Steel Company v. Lewellyn*, plaintiff sued to recover a certain sum paid by him

as an alleged excise tax assessed under section 301 of title III, of the Revenue Act of 1916 (c. 463, 39 Stat. 780) known as "Munitions Manufacturers' Tax." The facts were as follows:

Plaintiff entered into three contracts with the British Government for the manufacture and delivery, f. a. s. New York, of a certain number of high explosive shells. It was not equipped, nor did it have facilities, for doing any of the described work except the manufacture of steel suitable for the shells in bar form and, therefore, to procure the manufacture of the shells, it did certain work and entered into numerous contracts in relation to various steps in making the completed shell. The major portion of the work of manufacture was done by independent contractors, each of whom agreed to and did manufacture and deliver to plaintiff certain parts of shells. The Munitions Tax Act reads as follows:

"Sec. 301. (1) That every person manufacturing * * *. (c) projectiles, shells, or torpedoes of any kind * * *; or (f) any part of any of the articles mentioned in * * * (c) * * *; shall pay for each taxable year, in addition to the income tax imposed by title I, an excise tax of twelve and one-half per centum upon the entire net profits actually received or accrued for said year from the sale or disposition of such articles manufactured within the United States.
* * *."

The plaintiff contended in that case, as in this, that it did not manufacture the articles enumerated in the

act, but that such articles were manufactured by certain independent contractors. In answering plaintiff's contentions, the court said:

“* * * Petitioner, it is true, used the services of others, but they were services necessary to the discharge of its obligations and to the acquisition of the profits of such discharge. * * *”

and again:

“* * * How universal must the manufacturing be? Will the purchase of an elemental part destroy it? And how subsidiary must the work of the subcontractor be not to relieve the contractor—take from him the character of a ‘person manufacturing’? And such is the tangle of inquiries we encounter when we undertake to distinguish between what a contractor to deliver a thing does himself and what he does through others as subsidiary to his obligation.

“It is after all but a question of the kind or degree of agency—the difference, to use counsel’s words, between ‘servants and general agents’ and ‘brokers, dealers, middlemen or factors.’ And this distinction between the agents counsel deems important and expresses it another way as follows: ‘Every person manufacturing’ means the person doing the actual work individually, or through servants or general agents, and that the ownership of the material worked upon does not alter this meaning of the word.

“We are unable to assent to this meaning of the word. It takes from the act a great deal of utility and makes it miss its purpose. Of

course it did not contemplate that a 'person manufacturing' should use his own hands—it contemplated the use of other aid and instrumentalities, machinery, servants, and general agents, availing thereby of the world's division of labor, but it contemplated also the world's division of occupations, and, in this comprehensive way, contemplated that all of the world's efficiency might be availed of, and, when availed of for profits, the latter could not thereby escape being taxed. And where, indeed, was the hardship of it? The tax was on profits and measured by them."

The Munitions Tax Act under discussion are both drawn on the same general theory; the former provides that every person manufacturing shells, etc., or any part thereof, shall pay an excise tax of twelve and one-half per centum of the entire net profits received or accrued for the taxable year from the sale or disposition of such articles; the latter provides that there shall be paid on automobile trucks, etc., sold by the manufacturer or producer a tax equivalent to three per centum of the price for which so sold. The tax in each case is an excise on the manufacture measured by the sale price. The only difference is in the measure of the tax. One is measured by gross sales and the other by net profits arising from sale. The striking thing about the opinion in the Carbon Steel case is the broad, common sense view which the court takes in reaching the manifest intention of Congress and the summary way in which the court dis-

cards the refined distinctions and highly technical reasoning of the plaintiff.

The same conclusion was reached by the court in the case of Forged Steel Wheel Co. v. Lewellyn, *supra*, —another munitions tax case involving the same statute. There the question involved was whether the plaintiff was the manufacturer of a part of a shell within the meaning of the act. The plaintiff contended that it was not subject to the tax, for two reasons: First, that the article it turned out was not a part within the meaning of the act; and, second that it was not the manufacturer of a whole part, inasmuch as it either had made by an independent contractor, or bought in the market, the grade of steel required. The court confined itself largely to the consideration of the first contention and gave the second scant consideration. The case was decided against the taxpayer. In the Forged Steel Wheel Company case, as in the present case, the plaintiff contended that the case was ruled by Tide Water Oil Co. v. U. S., 171 U. S. 210. In distinguishing the cases, the court, in the Forged Steel case, said:

“For the sake of brevity we consider only the cited decisions of this court. They are Tide Water Oil Co. v. United States, 171 U. S. 210, 218; Worthington v. Robbins, 139 U. S. 337; Anheuser-Busch Association v. United States, 207 U. S. 556. These were customs cases and the statutes were given an interpretation on account of their purpose. They are besides not in point.

In the first one the statute had the words 'wholly manufactured,' and, giving effect to them it was decided that boxes made from shooks imported from Canada, though nailed together and the sides of the boxes thus formed trimmed in the United States, were not boxes, 'wholly manufactured' in the United States and entitled, upon being exported, to a drawback under a statute which allowed a drawback on articles 'wholly manufactured of materials imported.' The Worthington case was cited. In that case a duty was exacted upon 'white hard enamel' under a statute which imposed a duty of 25% upon 'watches, watch cases, watch movements, parts of watches and watch materials.' This on the contention of the Government that the enamel fell under the head of 'watch materials.' The contention was rejected, it being conceded that the enamel was used for many other purposes than for watch faces. In the Anheuser-Busch case a claim of drawback upon corks exported with bottled beer was rejected. The ground of the claim was that the corks were subjected to a special treatment to be fit for use and hence it was contended that they should be regarded as 'imported materials * * * used in the manufacture of articles manufactured or produced in the United States' that is the bottled beer. We replied 'a cork put through the claimant's process is still a cork.' The cases, therefore, do not sustain the contention for which they are cited."

Plaintiff relies upon the case of *Cate v. Connell*, 173 Fed. 445; *Hall and Kaul v. Friday*, 158 Fed. 593,

and *Lake v. Guillot*, 19 Southern 924. None of these cases are decisive of the point at issue and even though they were, they must give way to the decision of the Supreme Court in the *Carbon Steel* case cited above. In *Cate v. Connell*, the court stated the question to be:

“* * * To support their contention the petitioners do not rely upon any word in section 4 except ‘manufacturing,’ and so the decision of the case is made to turn upon the answer to this question: Was the repairing of automobiles, as performed by the respondent, a manufacturing pursuit?”

and in deciding the point said:

“* * * We do not think that the repairing of automobiles, as set out in the finding of the court below and in the evidence contained in the record, can fairly be described as a manufacturing pursuit. It seems to have been chiefly, if not altogether, the adjustment of automobile parts, bought from other persons, to existing automobiles. While no decided case is exactly in point, both the definitions of manufacture given by courts of authority and the decisions which those courts have rendered on particular facts are here persuasive against the petitioner. * * *”

The case is so clearly distinguishable from the present case on both facts and the law as to need no further discussion.

In the case of *Hall and Kaul v. Friday*, the question involved was whether a corporation, the principal business of which was the building and construction

of concrete arches, bridges, walls, and other structure *in situ*, the concrete being mixed as used in the structure, which when completed became part of the realty, was engaged principally in manufacturing within the meaning of the Federal Bankruptcy Act of 1898. The court held that it was not engaged in manufacturing because what it built or made was attached to and became a part of the realty as fast as it was made—that the bankrupt was a builder or constructor, rather than a manufacturer.

There are other considerations which point irresistibly to the conclusion that Congress intended that the transaction involved in the present case should be subject to the tax. Subdivision (3) of section 900, levies a tax on automobile parts and provides that when such parts are sold to a manufacturer they shall be exempt from the tax. Chassis and bodies are unquestionable “parts” of automobile trucks or wagons; hence there is no escaping the conclusion that when Congress levied a tax on the manufacture and sale of the completed article, it contemplated that such parts would be sold to a person who would be a manufacturer within the meaning of the act, and that when such person took these parts and did further work upon them, or manufactured or caused to be manufactured other parts and assembled or caused to be assembled the parts purchased and those manufactured by himself or by others for him into a completed truck, that person should be subject to the tax.

The plaintiff does not seem to deny that he sold a completed automobile truck. Consequently, it is sufficient to point out that what plaintiff sold and delivered to his customer was a completed truck and the consideration he received therefor was the price of the completed truck.

POINT II.

Taxes Paid Voluntarily and Without Duress and Protest, Cannot Be Recovered.

1. There is nothing in the stipulation of facts, nor in the exhibits, to indicate that the taxes were paid under protest, and as the burden of proof is upon the plaintiff, it must be assumed that the taxes were paid voluntarily.

It has been settled law since the decision of the Supreme Court in the case of *Chesebrough v. U. S.*, 192 U. S. 253, that taxes paid voluntarily and without protest cannot be recovered back by suit and that payments with knowledge and without compulsion are voluntary. In that case the petitioner had entered into an agreement with the Chesebrough Building Company to convey to that corporation certain real estate which he then owned, and to deliver and execute a deed therefor on June 5, 1900. On that day he tendered such deed to the purchaser. The purchaser refused to accept the deed until the petitioner had affixed certain stamps thereto as provided by sec-

tion 6 of the Act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes." The petitioner thereupon purchased from the Collector of Internal Revenue the necessary stamps and affixed them to the deed. He then brought suit to recover the amount paid for such stamps, on the ground that the act was unconstitutional and void, his claim for the refund thereof having been duly filed with the Commissioner of Internal Revenue prior thereto. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the Supreme Court. On page 259, Mr. Chief Justice Fuller, speaking for the court said:

"The rule is firmly established that taxes voluntarily paid cannot be recovered back and payments with knowledge and without compulsion are voluntary. At the same time, when taxes are paid under protest that they are being illegally exacted, or with notice that the payer contends that they are illegal and intends to institute suit to compel their repayment, a recovery in such a suit may, on occasion, be had, although generally speaking, even a protest or notice will not avail if the payment be made voluntarily, with full knowledge of all the circumstances, and without any coercion by the actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the

party making the payment, from which the latter has no other means of immediate relief than such payment." (The court here reviewed the previous decisions on this point.)

The Chesebrough case was followed in the case of *U. S. v. New York and Cuba Mail Steamship Co.*, 200 U. S. 488. There the defendant had affixed stamps required by the War Revenue Act of 1898 to the manifest of a vessel in order to obtain clearance under section 4179, R. S., without presenting any claim or notice to the Collector of Internal Revenue from whom the stamps were purchased, or to the collector of the port from whom the clearance was obtained that the same were purchased or affixed under protest or otherwise than voluntarily. Subsequently, an action was brought to recover the amount paid for the stamps on the ground that the tax was unconstitutional as a tax on exports. The act in question had in fact been held unconstitutional in the case of *Fairbanks v. U. S.*, 181 U. S. 283. The Supreme Court, however, sustained a demurrer to the complaint, on the ground that the taxes sought to be recovered had not been paid under protest or duress and, consequently, could not be recovered. In answer to the contention that duress or coercion in the payment of taxes is not a necessary basis of the right of recovery thereof, under the Act of Congress of May 12, 1900, entitled "An act authorizing the Commissioner of Internal Revenue to redeem or make

allowance for Internal Revenue stamps," the court said, page 495:

"It certainly does not follow that because, in some instances, protest or duress cannot exist, that they cannot exist in other cases, nor that the act intended to destroy the difference between voluntary and involuntary payment of taxes."

Again, the court says. at page 493:

"The applicable principle is expressed in the extract from the Chesebrough case which we have given above. It is stated in *R. R. Co. v. Commissioners*, 98 U. S. 542, and quoted from that case in *Little v. Bowers*, 134 U. S. 547, at page 554, as follows: 'Where a party pays an illegal demand with full knowledge of all the facts which relate to such demand, without an immediate and urgent necessity therefor, or unless to release his person or property from detention or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back.'"

The above cases are conclusive against the plaintiff's right of action in the case at issue.

See also:

Berneys v. U. S. 208 U. S. 614;

Merck v. Treat, 202 Fed. 133;

Newhall v. Jordan, 160 Fed. 661;

Gulbenkian v. U. S., 175 Fed. 860;

Cooley on Taxation, Vol. II, 3rd Ed., p. 1495;

Dunnell Mfg. Co. v. Newell, 2 Atl. 769.

2. What constitutes duress or compulsion:

There is duress or compulsion when the taxpayer has been placed under arrest or when there has been a distraint or seizure of his chattels for the purpose of compelling him to pay the tax; or when the officer, being armed with a lawful process and having authority to enforce his demand, has made a distinct threat to seize and sell property; or a searching for property on which to levy. It is also, possibly enough to constitute duress or compulsion if the officer simply demands payment of the tax under cover of a warrant or other process, which gives him legal power to enforce his demand by compulsory proceedings against the person or property and which makes it his duty to do so, although he makes no threat and takes no steps to distraint or levy. And in this case the process has the force of an execution and the taxpayer is justified in believing that if he refuses to pay the tax a levy on his property will follow as the only alternative and, therefore, he is not obliged to wait for a distraint or a threat of distraint. But there is no duress or legal compulsion where the payment is made before the tax is due or delinquent. (*Merrill v. Austin*, 53 Cal. 379; *Santa Rosa Bank v. Chalfant*, 52 Cal. 170; *Van Hise v. Rensselaer Co.*, 21 Misc. (N. Y.) 572, 48 N. Y. Suppl. 874; *Atchison, etc., R. R. Co. v. Atchison Co.*, 47 Kans. 722, 28 Pac. 99), or where the officer has no warrant or has a warrant which is entirely void so that he could not carry out his threat. (*Bakersfield etc., Oil Co. v. Kern Co.*, 144

Cal. 148, 77 Pac. 892; *Morris v. New Haven*, 78 Conn. 673, 63 Atl. 123; *Godkin v. Doyle Tp.*, 143 Mich. 236, 106 N. W. 882; *Carton v. Uinta Co.*, 10 Wyo. 416, 69 Pac. 1013; *Sonoma Co. Tax Case*, 13 Fed. 789; *Little v. Bowers*, 134 U. S. 547; *R. R. Co. v. Commissioners*, 98 U. S. 542; *U. S. v. New York and Cuba Mail Steamship Co.*, 200 U. S. 488; *Chesebrough v. U. S.*, 192 U. S. 253.)

No warrant of distraint or other process had been issued against the plaintiff at the time of the payment of the tax and no statement was made by the officer to whom payment was made, or by any other Government officer, which would lead the taxpayer to believe that such a warrant had been issued. Furthermore, the taxes were not assessed until some days after payment, and no distraint warrant could have been issued under the law until after assessment had been made, and until the expiration of ten days after notice and demand for payment thereof. Sections 3184, 3185, 3187, and 3188, Revised Statutes. The taxes for the month of December, 1919, were not due or delinquent at the time they were paid. Section 903 of the Revenue Act of 1918 provides that every person liable to tax under section 900 of the act shall make monthly returns and pay the taxes imposed by such section to the collector at such time and in such manner as the commissioner, with the approval of the secretary, may by regulations prescribe, and that the tax shall, without assessment by the commis-

sioner, or notice from the collector, be due and payable to the collector at the time so fixed for filing the return. By article 37 of Regulations 47, the commissioner, with the approval of the secretary, has prescribed that such returns shall be made and the tax paid on or before the last day of each month, covering all transactions of the preceding month. Under the law and regulations, therefore, the December tax was not due until January 31, 1920 (one day after it was paid) and would not have been delinquent until February 1, 1920. The payment of the December tax was, therefore, voluntary and without duress or compulsion, both because no distraint warrant or other process had been, or could have been, issued against the taxpayer at the time of payment, and because the taxes were not due or delinquent at that time.

3. What constitutes a sufficient protest:

There is no protest unless the taxpayer at the time of payment protests to the officer seeking to enforce payment that the alleged tax is illegally demanded or that he intends to bring suit for the recovery thereof:

Erskine v. Van Arsdale, 15 Wall. 75;

Philadelphia v. Collector, 5 Wall. 720, l.c. 732;

Chesebrough v. U. S., 192 U. S. 253;

Beer v. Moffatt, 192 Fed. 984;

Herold v. Kahn, 159 Fed. 608;

Realty Co. v. Maxwell, 206 Fed. 333;

Marck v. Treat, 202 Fed. 133;

Johnson & Johnson v. Herold, 161 Fed. 593.

Conclusion.

The defendant respectfully submits that judgment of the lower court should be sustained for the following reasons:

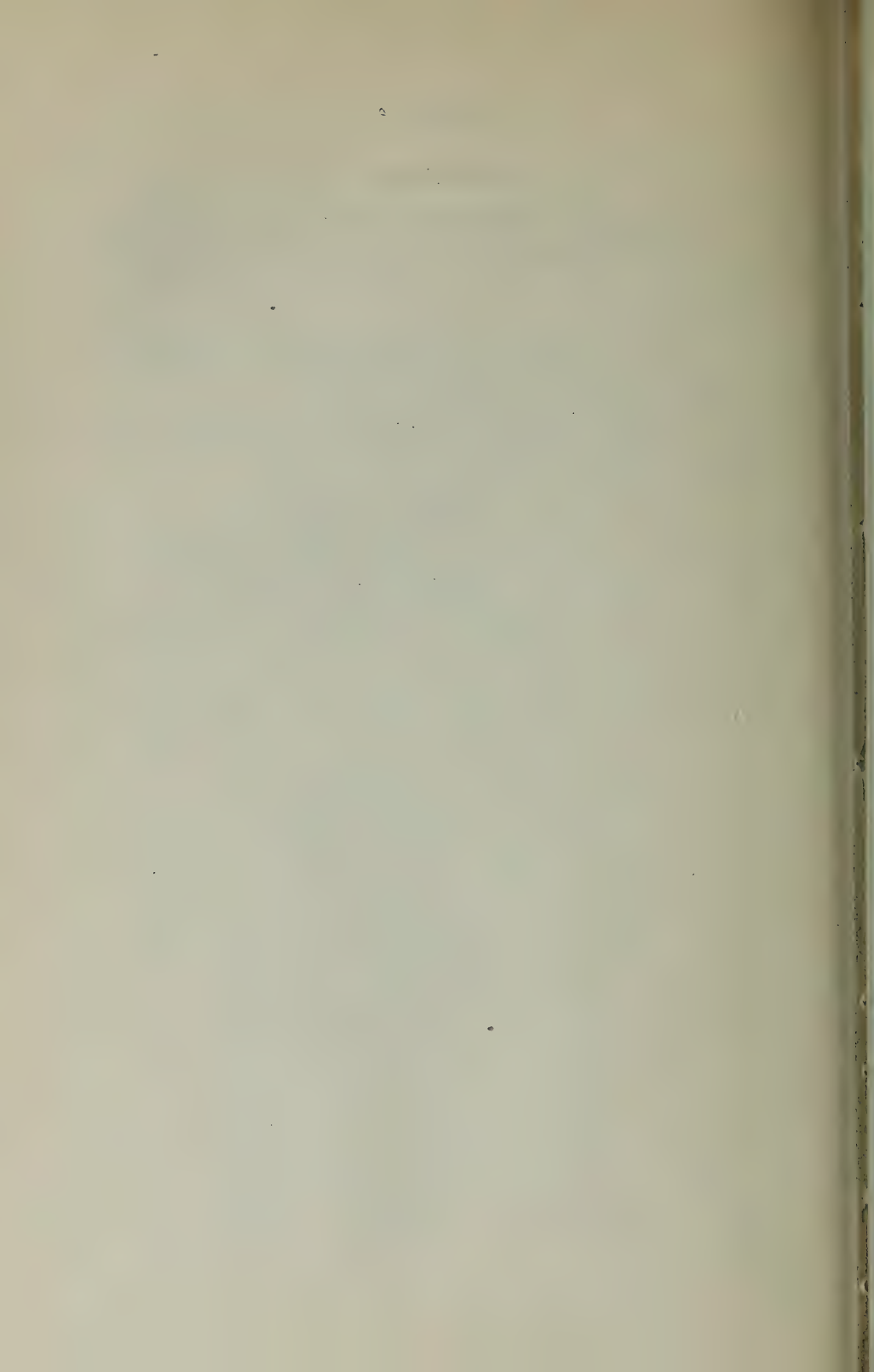
1. Because the plaintiff manufactured or produced, and sold complete automobile trucks;
2. Because the taxes were paid voluntarily and without duress or protest.

JOSEPH C. BURKE,

United States Attorney,

ROBERT B. CAMARILLO,

Assistant United States Attorney.



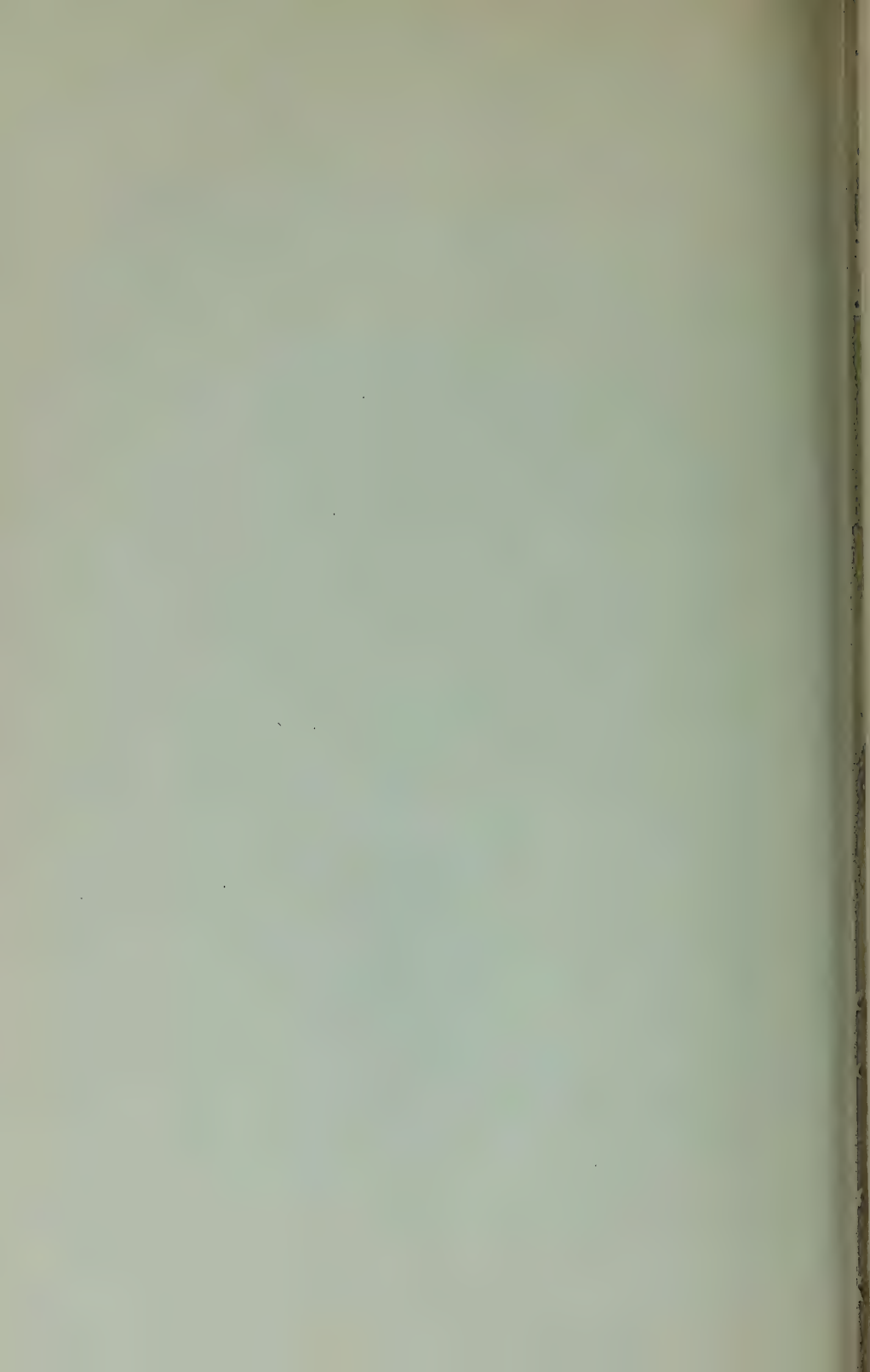
United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUIS FASSOLLA, charged as Louis Fosella,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.

FILED
JUN 21 1922
F. D. MONCKTON,
CLERK.



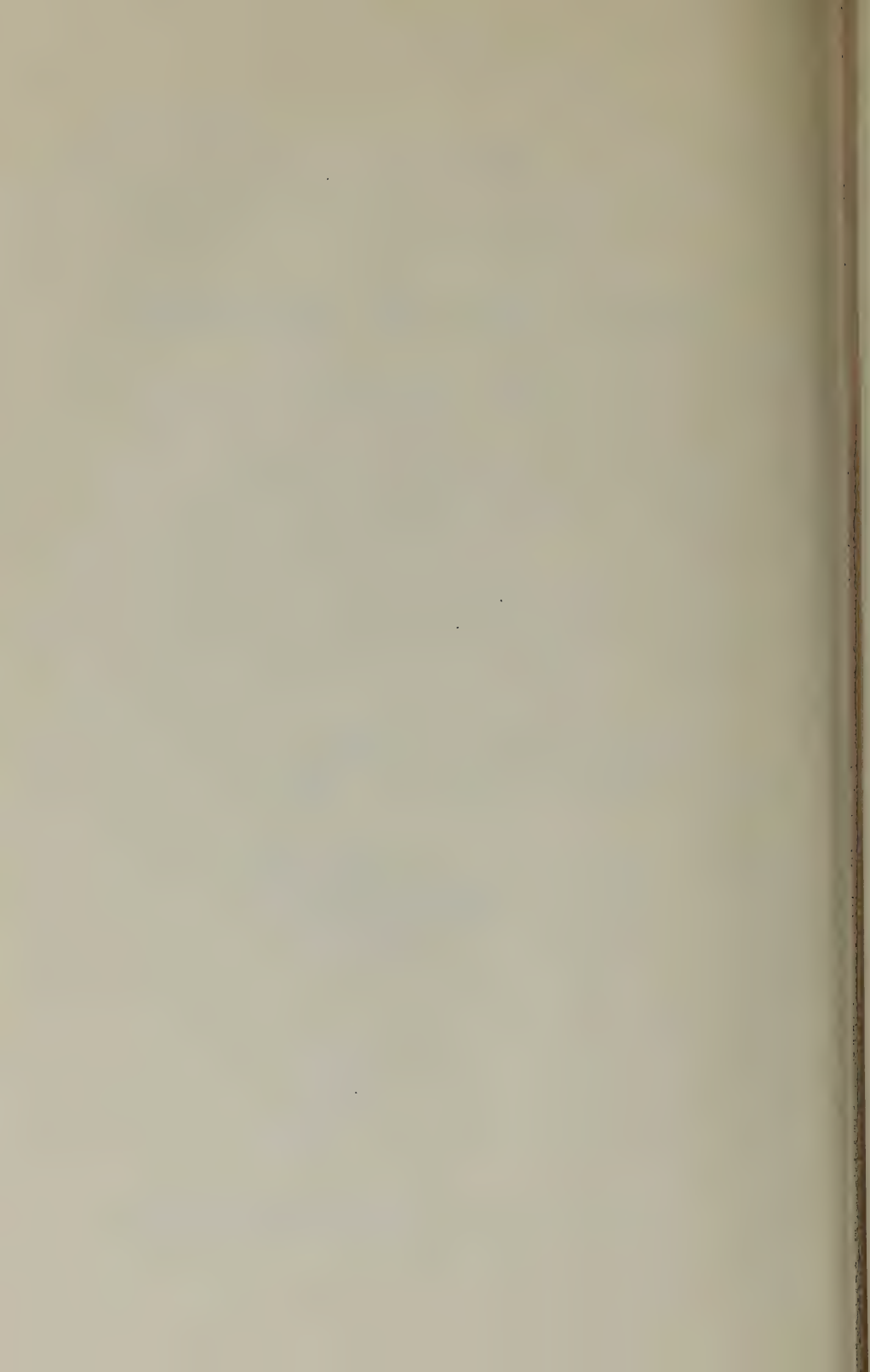
No.

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOUIS FASSOLLA, charged as Louis Fosella,
Plaintiff in Error,
vs.
UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

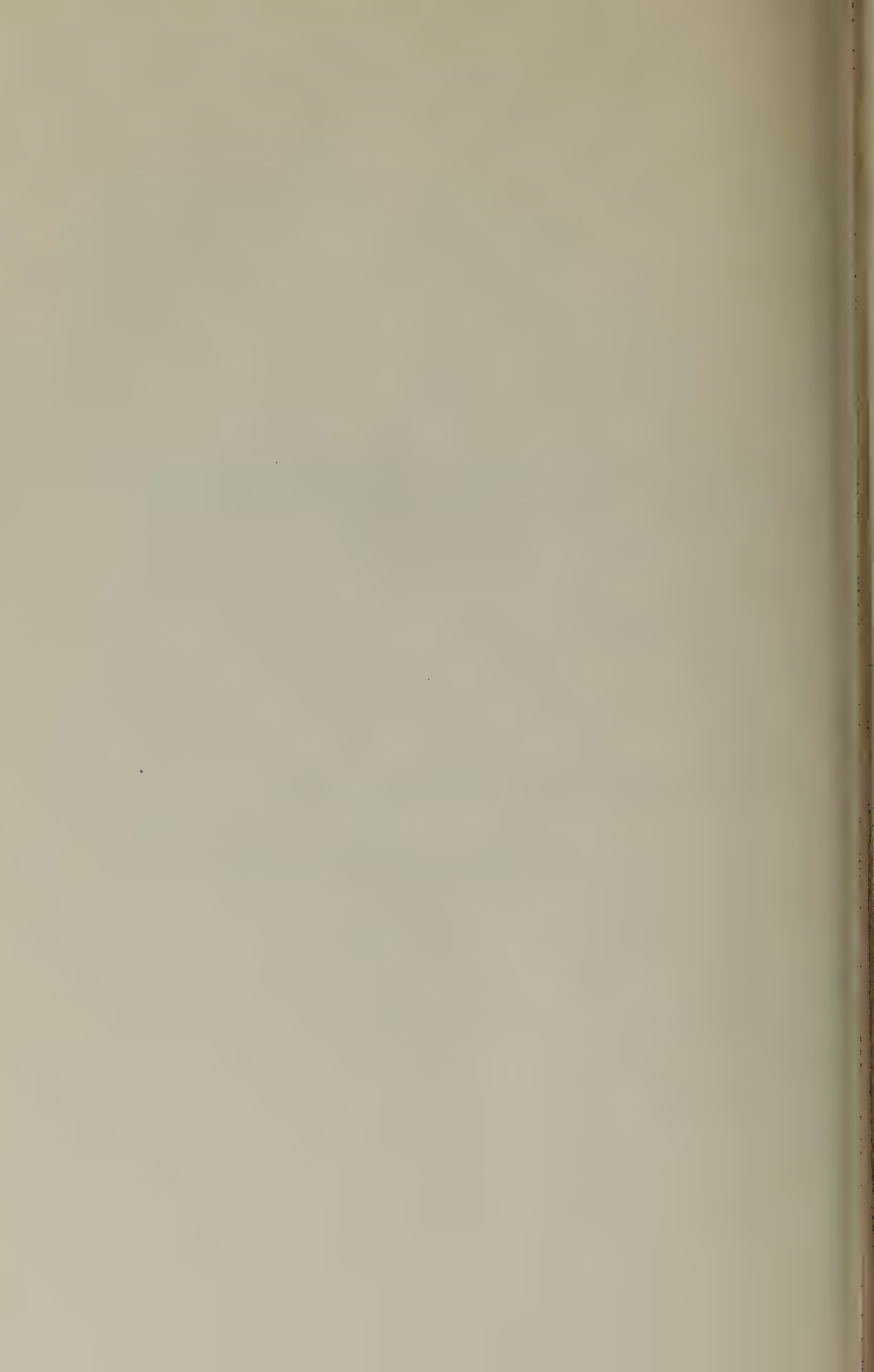
Upon Writ of Error to the United States District
Court, for the Southern District of Cal-
ifornia, Southern Division.



INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Assignment of Errors.....	43
Bill of Exceptions.....	18
Citation	2
Information	6
Minutes	10
Names and Addresses of Attorneys.....	1
Order	48
Order Permitting Cash Deposit in Lieu of Bond..	52
Petition for Writ of Error	46
Praecipe	53
Supersedeas Bond.....	49
Verdict	17
Writ of Error.....	3



Names and Addresses of Attorneys.

For Plaintiffs in Error:

LEO V. YOUNGWORTH, Esq., and
HARRY J. McCLEAN, Esq., Merchants National
Bank Building, Los Angeles, California.

For Defendant in Error:

JOSEPH C. BURKE, Esq., United States At-
torney;
MACK MEADER, Esq., Assistant United States
Attorney, Federal Building, Los Angeles,
California.

United States of America, ss.

To UNITED STATES OF AMERICA, and the
HONORABLE J. C. BURKE, United States District
Attorney, Southern District of California.

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 25th day of May, A. D. 1922, pursuant to Writ of Error in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain proceeding United States versus Louis Fassolla, charged as Louis Fosella, defendant. and you are ordered to show cause, if any there be, why the judgment in the said proceeding mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable BENJAMIN F.
BLEDSOE United States District Judge for
the Southern District of California, this 18th
day of May, A. D. 1922, and of the Inde-
pendence of the United States, the one hun-
dred and Forty Sixth

Bledsoe

U. S. District Judge for the Southern District
of California.

[Endorsed]: Service of a copy of the within cita-
tion is hereby acknowledged this 20th day of May A.
D. 1922 Mark L. Herron Ass't United States Attor-

ney # Cr. 3831 S.D. In the United States Circuit Court of Appeals for the NINTH CIRCUIT UNITED STATES OF AMERICA vs. LOUIS FASSOLLA, charged as Louis Fosella. Citation Filed May 18, 1922 CHAS. N. WILLIAMS, Clerk Douglas Van Dyke Deputy

UNITED STATES OF AMERICA, SS.
THE PRESIDENT OF THE UNITED STATES
OF AMERICA,

To the Judges of the District Court of the United States, for the Southern District of California,
GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between United States of America, Plaintiff, and Louis Fassolla, Defendant, a manifest error hath happened, to the great damage of the said defendant as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 25th day of May next, in the said

United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM HOWARD
TAFT, Chief Justice of the United States,
this 28th day of April in the year of our
Lord one thousand nine hundred and twenty-
two and of the Independence of the United
(Seal) States the one hundred and Forty-sixth

Chas. N. Williams,
Clerk of the District Court of the United
States of America, in and for the Southern
District of California.

4-28-22

The above writ of error
is hereby allowed.

Trippet
Judge.

By R S Zimmerman
Deputy Clerk.

I hereby certify that a copy of the within Writ of Error was on the 28th day of April, 1922, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Chas. N. Williams
Clerk of the District Court of the United States
for the Southern District of California.

By R S Zimmerman
Deputy Clerk.

A copy of within Writ of Error is hereby, on this 28th day of April, 1922, lodged in the office of the Clerk of the said United States District Court, for the Southern District of California, Southern Division, for said Defendants in Error.

Approved as to form, as
provided in rule 45.

Mack Meader

Asst. U. S. Attorney.

Leo V. Youngworth

Harry J. McClean

Attorneys for Plaintiff in Error.

Chas. N. Williams

Clerk of the District Court of the United States
for the Southern District of California.

By R S Zimmerman

Deputy Clerk

[Endorsed]: 3831 Crim. United States Circuit
Court of Appeals for the NINTH CIRCUIT LOUIS
FASSOLLA, charged as Louis Fosella, Plaintiff in
Error vs. UNITED STATES OF AMERICA, De-
fendant in Error Writ of Error Filed Apr 28 1922
CHAS. N. WILLIAMS, Clerk By R S Zimmerman
Deputy Clerk

No. _____

Filed _____

Viol: Sections 3 and 21, Title II of the National Prohibition Act of October 28, 1919.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

THE UNITED STATES OF)	
AMERICA,	:	
	)	Plaintiff,
	:	
- vs -	)	INFORMATION.
	:	
LOUIS FOSELLA,)	
	:	
	)	Defendant.

- - - - -

Leave of Court first being had and obtained, comes now Joseph C. Burke, Esq., United States Attorney for the Southern District of California, who for the said United States of America in this behalf prosecutes, on this 15th day of March, 1922, in the January term thereof, and for said United States gives the Court to understand and be informed:

That LOUIS FOSELLA whose full and true name, other than as herein stated, is to the affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 5th day of November, 1921, at or near Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the

United States and of this Honorable Court, did knowingly, wilfully and unlawfully sell to D. McD. Jones, certain intoxicating liquor fit for beverage purposes, to-wit: one-half gallons of wine containing alcohol in excess of one-half of one per cent by volume, at and for the sum of three (\$3.00) Dollars, lawful money of the United States; in violation of Section 3, Title II of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the said Joseph C. Burke, Esq., Attorney for the United States as aforesaid, does further give the Court to understand and be informed:

That LOUIS FOSELLA, whose full and true name, other than as herein stated, is to the affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 5th day of November, 1921, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully have in his possession certain intoxicating liquor fit for beverage purposes, to-wit: thirty-five (35) gallon demijohns of wine, one-half gallon bottle of wine, and three (3) sacks containing a number of bottles of illicit liquor, all of which said

liquor then and there contained alcohol in excess of one-half of one per cent by volume; in violation of Section 3, Title II of the National Prohibition Act of October 28, 1919.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the said Joseph C. Burke, Esq., Attorney for the United States as aforesaid, does further give the Court to understand and be informed:

That LOUIS FOSELLA, whose full and true name, other than as herein stated, is to the affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 5th day of November, A. D. 1921, at Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, wilfully and unlawfully maintain a common nuisance, to-wit: a room, building and place at Vermont Avenue and Redondo Boulevard, in said city, where intoxicating liquor for beverage purposes, to-wit: wine, containing alcohol in excess of one-half of one per cent by volume, was manufactured, kept, sold and bartered; in violation of Section 21 Title II of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

WHEREUPON, the said Attorney for the United States, who prosecutes as aforesaid in this behalf, prays the consideration of the court in the premises, and that due process of law may be awarded against the said LOUIS FOSELLA in this behalf to make him answer the said United States concerning the premises aforesaid.

Joseph C Burke

United States Attorney

T F Green

Assistant United States Attorney

UNITED STATES OF AMERICA)
 : SS.
Southern District of California)

T. F. GREEN, being first duly sworn on oath, says: That he is Assistant United States Attorney for the Southern District of California; that he has read the foregoing Information charging one LOUIS FOSELLA with violation of Sections 3 and 21, Title II of the National Prohibition Act of October 28, 1919;

Affiant further says that the matters and things set forth in said Information are true in substance and in fact.

T F Green

SUBSCRIBED AND SWORN to before
me this 14th day of March, 1922.

(Seal) Chas. N. Williams, Clerk U. S. District
 Court, Southern District of California.

By Louis J. Somers

Deputy

[Endorsed]: No. 3831 Cr IN THE DISTRICT COURT OF THE UNITED STATES for the Southern District of California Southern Division United States of America Plaintiff vs. Louis Fosella, Defendant. INFORMATION Filed Mar. 15 1922 At—min past — o'clock — M CHAS. N. WILLIAMS, Clerk Louis J Somers Deputy

At a stated term, to-wit: the January A. D. 1922 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the City of Los Angeles, on Wednesday the 15th day of March in the year of our Lord one thousand nine hundred and twenty-two.

PRESENT: THE HONORABLE OSCAR A. TRIPPET, District Judge.

UNITED STATES OF AMERICA,)	
	)	Plaintiff
)	
vs.	)	No. 3831
	)	Crim. S. D.
Louis Fosella,	)	Defendant

T. F. Green, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, having presented to the court a verified Information herein; now, upon motion of said T. F. Green, Esq., it is by the court ordered that said Information be filed; that the bond of defendant be fixed in the sum of \$1000.00 and that this cause be set for arraignment and plea for Monday, March 20th, 1922.

At a stated term, to wit: the January A. D., 1922 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof in the City of Los Angeles, on Monday the twenty-seventh day of March, in the year of our Lord one thousand nine hundred and twentytwo;
Present:

The Honorable Benjamin F. Bledsoe, District Judge.

United States of America, Plaintiff,)	
)	
vs.	)	No. 3831
	)	Crim. S. D.
Louis Fosella, Defendant.)	

This cause coming on at this time for arraignment and plea; T. F. Green, Esq., Assistant U. S. Attorney, appearing as counsel for the Government and H. L. Dickson, Esq., appearing in court on behalf of the defendant herein who is not present, and said H. L. Dickson, Esq., having asked permission to interpose a plea of Not Guilty on behalf of his client and said permission having been given and thereupon a plea of Not Guilty having been entered on behalf of said defendant, it is by the court ordered that this cause be continued to the April Calendar for setting for trial.

At a stated term, to wit, the January Term, A. D. 1922 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles on Tuesday the

18th day of April in the year of our Lord one thousand nine hundred and twenty-two.

PRESENT: THE HONORABLE BENJAMIN F. BLEDSOE, District Judge.

UNITED STATES OF AMERICA,)	
	Plaintiff)
)	
vs.	)	No. 3831
	)	Crim. S. D.
Louis Fosella, true name, Louis)	
Fassolla.)	

This cause coming on at this time for trial of defendant herein before a jury to be empanelled; Mack Meader, Esq. Assistant U. S. Attorney, appearing as counsel for the Government; defendant being present in court with his attorney H. L. Dickson, Esq., P. S. Noon, being also present as stenographic reporter of the testimony and proceedings and counsel for the respective parties having announced their readiness to proceed with the trial of this cause and the court having ordered that this cause be proceeded with and that a jury be empanelled herein;

Thereupon the following names were drawn from the jury box to-wit: J. L. Davidson; Ray Denn; Shannon Crandall; A. I. Smith; Fred G. Farner; Lew Labory; Edward H. Reich; Sam H. Harris; C. E. Howard; Ben Albertson; Antone Borchard and Chas. E. Toberman; and said jurors having been sworn on voir dire and passed for cause; and

Counsel for the respective parties not desiring to exercise their right to peremptorily challenge the jurors

now in the box, it is by the court ordered that said jurors be sworn in a body as the jury to try this cause, said jury being as follows, to-wit:

- | | |
|----------------------|------------------------|
| 1. J. L. Davidson, | 7. Edward H. Reich, |
| 2. Ray Denn, | 8. Sam H. Harris, |
| 3. Shannon Crandall, | 9. C. E. Howard, |
| 4. A. I. Smith, | 10. Ben Albertson, |
| 5. Fred G. Farner, | 11. Antone Borchard, |
| 6. Lew Labory, | 12. Chas. E. Toberman, |

and

Thereupon D. McD. Jones is called, sworn and testifies in behalf of the Government, is cross-examined by said H. L. Dickson, Esq.; is subject to re-direct examination by said Mack Meader, Esq., and is examined by the court; and

W. C. Jaffkey is called, sworn and testifies in behalf of the Government and is cross-examined by H. L. Dickson, Esq.; and

R. E. Steckel is called, sworn and testifies on behalf of the Government and is cross-examined by H. L. Dickson, Esq.; and John H. Pelletier is called, sworn and testifies in behalf of the Government and is cross-examined by H. L. Dickson, Esq., and

Now, at the hour of 11:50 o'clock A. M. the Government rests with reservation that it may later introduce certain evidence; and

L. Fassolla having been called, sworn and having testified in his own behalf; cross-examined by Mack Meader, Esq., and examined by the court;

Now, at the hour of 12:10 o'clock P. M. the court admonishes the jury that during the progress of this

trial they are not to speak to anyone about this cause or any matter or thing therewith connected and that until said cause is finally submitted to them for their consideration under the instructions of the court they are not to speak to each other about this cause or anything therewith connected, and declares a recess to the hour of two o'clock P. M.; and

Now, at the hour of two-twenty o'clock P. M. the court having reconvened and all being present as before, and the jury all being present; and

D. McD. Jones, a witness heretofore sworn, having been recalled and having testified further in behalf of the Government; cross-examined by H. L. Dickson, Esq., and examined by the Court; and

John H. Pelletier, a witness heretofore sworn, having been recalled and having testified in behalf of the Government and cross-examined by H. L. Dickson, Esq., and

R. E. Steckel, a witness heretofore sworn, having been recalled and having testified for the Government;

Now, at the hour of 2:43 o'clock P. M. the Government rests; and

Harry Hill, having been called, sworn and having testified in behalf of the defendant; and

D. J. O'Leary having been called, sworn and having testified in behalf of the Government and cross-examined by H. L. Dickson, Esq., attorney for the defendant; and

At the hour of 2:50 o'clock P. M. the court having ordered that each side be allowed ten minutes for the presentation of argument to the jury; and

At the hour of 2:53 o'clock P. M. Mack Meader, Esq., having argued in behalf of the Government; and

At the hour of 3:03 o'clock P. M. H. L. Dickson, Esq., having argued to the jury in behalf of the defendant; and

Mack Meader, Esq., having argued in rebuttal in behalf of the Government;

Thereupon at the hour of 3:11 o'clock P. M. the court instructs the jury with respect to the law involved in this cause and at the hour of 3:30 o'clock P. M. Deputy U. S. Marshal A. H. Blakeley is sworn to care for the jury during the deliberation of its verdict and thereupon the jury retires to deliberate upon its verdict; and

Now, at the hour of 3:55 o'clock P. M. the jury returns into court and having been asked if it has agreed upon a verdict thereupon states that it has so agreed, and upon being required to present the same, the said verdict is thereupon presented and as read by the clerk of the court is in words and figures as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

United States of America, Plaintiff vs. Louis Fassolla, charged as Louis Fosella, Defendant. No. 3831

Cr. S. D. We, the jury in the above entitled cause, find the defendant GUILTY as charged in the first count of the Information; and GUILTY as charged in the second count of the Information and GUILTY as charged in the third count of the Information. Los Angeles, California, April 18th, 1922. Shannon Crandall, Foreman. and the verdict of guilty having been presented against the defendant herein as aforesaid the court orders the verdict filed, and excuses the jury from further attendance upon this court to the hour of eleven o'clock A. M. April 19th, 1922; and pronounces sentence upon defendant herein for the offence of which he stands convicted, namely, violation of the National Prohibition Act of October 28, 1919, and it is the judgment of the court that defendant stand committed to the Orange County Jail for the term and period of six months on the first count and for the term and period of six months on the third count, said sentence imposed on the third count not to commence to run until the expiration of sentence imposed on the first count; and it is further ordered by the court that said defendant pay unto the United States of America a fine in the sum of \$500.00 on the second count and stand committed to the said Orange County Jail until said fine is paid or defendant is discharged according to law, said sentence imposed on the second count not to commence to run until the expiration of sentence imposed on the third count; and it is further ordered by the court that the liquor seized herein be turned over to the United States Marshal

for destruction by said United States Marshal and upon motion of H. L. Dickson, Esq., the attorney for the defendant, it is by the court ordered that said defendant have a ten day stay of execution of sentence.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

* * *

United States of America, Plaintiff,)	
)	
Vs.	)	No. 3831
	)	Cr. S. D.
Louis Fosella, true name Louis Fas-)	
solla,)	
Defendant.)	

We, the jury in the above entitled cause, find the defendant Guilty, as charged in the First Count of the Information; and Guilty, as charged in the Second Count of the Information; and Guilty, as charged in the Third Count of the Information.

Los Angeles, California, April 18th, 1922.

Shannon Crandall
FOREMAN.

[Endorsed]: Filed Apr 18 1922 Chas. N. Williams, Clerk Douglas Van Dyke Deputy

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

UNITED STATES OF AMERICA,)	
Plaintiff,)	
)
vs.)	BILL OF
	) EXCEPTIONS
LOUIS FASSOLLA, charged as)	No. 3831
Louis Fosella,)	Criminal
Defendant.)	

Be it remembered that heretofore, to-wit: on the 18th day of April, 1922, the above entitled action came on regularly for trial, the plaintiff appearing by Mack Meader, Assistant United States District Attorney and the defendant appearing by H. L. Dickson, Esquire, and that thereupon the following evidence was introduced, and proceedings taken, and none other except as are hereinafter set forth.

D-McD. JONES

Was a witness for and on behalf of the plaintiff, and being duly sworn, testified that he was a police officer of the City of Los Angeles on the 5th day of November, 1921; that he saw the defendant on the 5th day of November.

Q Under what circumstances?

A November 5th, about 9 o'clock Officer Steckel, Jaffkey, Captain Pelletier, McCarthy and myself were in front of the residence of Lou Fosella. We caught

(Testimony of D. McD. Jones.)

a machine with a half gallon of liquor in it, driven by Herman Dedlinger, which was purchased from Louis Fosella.

That thereafter the witness secured a search warrant and returned to the defendant's house and the witness went to the front door and the defendant sold him a half gallon of wine for \$3.00, giving defendant a \$5.00 bill and receiving \$2.00 in change, also the wine; that he left the place to return to the machine and Officers Jaffkey and Steckel returned to the house and later the witness with other officers entered the premises and served the search warrant on the defendant. That the officers searched the premises and found a quantity of liquor in two or three of the rooms; that the liquor seized was taken to the University Police Station where the liquor was marked for identification. That the sale was made in the doorway of defendant's home between 11 and 12 o'clock at night. That at the time the money changed hands and the half gallon of wine was received, Officers Jaffkey and Steckel and Captain Pelletier were standing back of him, Jaffkey approximately twenty feet, and the other officers farther away. That the light used in making the change was a flashlight in the hands of the witness. That in making the purchase, witness used a pass-word "Redondo"; that he had been informed by Herman Dedlinger that he could not purchase the wine unless he used that password; that on the strength of that password the defendant gave

(Testimony of D. McD. Jones.)

him a half gallon of wine for \$3.00. That when the purchase was made the witness gave the defendant a "marked" \$5.00 bill, the numbers of which had been taken. That the defendant was afterwards searched for the \$5.00 bill and the same could not be found. That from three to five minutes elapsed between the time the purchase was made and the time when the witness attempted to recover the marked money. That there was a large sum of money scattered between the mattress in the bedroom occupied by the defendant, but that the marked \$5.00 could not be found. That the officers searched various places in the room in which they thought a \$5.00 bill might be concealed—in clothing, wearing apparel, trunks, baggages, and made an extensive search for it.

W. C. JAFFKEY

A witness for and on behalf of the plaintiff, being first duly sworn, testified as follows:

That he was a police officer of the City of Los Angeles on the 5th day of November, 1921.

Q Tell the jury under what circumstances you saw the defendant about the 5th day of November, 1921?

A I was standing about 25 feet away from the house, behind a palm tree, when Officer Jones was at the door talking to Lou Fosella and I could see Lou Fosella hand Officer Jones something which Officer Jones said was the two one dollar bills; and after Officer Jones left the place I walked over to the ma-

(Testimony of W. C. Jaffkey.)

chine before Jones did and met Officer Jones at the machine, and he said he bought a half gallon of wine, and to put that in the machine;

That thereafter Officer Steckel and Pelletier, and the witness, and one other officer, went to the house to make another buy, but was refused; that they then forced an entrance through the door, and upon gaining admittance, served the search warrant by reading the same to the defendant. That on making a search of the premises, they found two or three sacks of bottles of wine, and a quantity of empty bottles and a lot of demijohns. Some of the demijohns were full and a lot of them partially filled, and some empty. That at the time of the purchase of the half gallon of wine by Officer Jones, the witness was about 25 feet away from Jones; that he saw the flashlight turned on at that time by Officer Jones.

Q Did you see a package of any kind pass from the defendant to Officer Jones?

A No, I didn't see any.

Q Did you see anything pass from Officer Jones to the defendant?

A No, I didn't see that because the light wasn't on then.

That the night was dark.

Q Did you see the buy made? Did you see any package or bottle handed Officer Jones?

A I did not.

(Testimony of W. C. Jaffkey.)

That he helped in the search to find the \$5.00 "marked" bill; that it was all of five minutes between the time when the purchase was made and the time when the search was instituted.

R. E. STECKEL

A witness for and in behalf of the plaintiff, being first duly sworn, testified as follows:

That he was a police officer in the City of Los Angeles on the fifth day of November, 1921.

Q Just tell who was present and under what circumstances you saw the defendant?

A There were Officers Jones and Jaffkey, Captain Pelletier, Officer McCarthy and myself. We had apprehended a machine in front of the place driving away, containing some wine, liquor, and had obtained what the man said was a password that would enable us to buy liquor. Officer Jones went up and in, went into the place. Was gone for some three, four, five minutes, with Jaffkey standing out in the yard and Captain Pelletier and I across the street. Then Jones and Jaffkey came back and Jones had a container which he said was wine. Then we drove the machine up into the driveway and stopped. Jaffkey and I got out of the machine and Jaffkey walked up on the steps and knocked at the door. Pretty soon a man came to the door and Jaffkey tried to buy some wine. He said he was out * * * * * I again knocked at the door and he opened the door and I said "We

(Testimony of R. E. Steckel.)

are from Redondo. We would like to buy some wine", and he started to shut the door and I said "Just a minute"; I said "We are police officers."

That thereafter the officers gained entrance to the house and took the defendant in the bedroom and there searched him and Officer Jaffkey read the search warrant. That they then searched the house and found a quantity of wine and a number of bottles, some filled and some empty, and several demijohns containing various quantities of wine, from one gallon up to three or four. They then searched Fosella's room for the \$5.00 bill; that they found a quantity of bills of various denominations, but failed to find the \$5.00 bill which they were looking for.

JOHN H. PELLETIER

A witness for and in behalf of the plaintiff, being first duly sworn, testified as follows:

That he was a police officer of the City of Los Angeles on the 5th day of November, 1921, and saw the defendant on that date.

Q Tell the circumstances of seeing him on that night. Who was present, what occurred, and what was said and done?

A With Officers Jones and Steckel and Jaffkey we went out to his place near Gardena and watched that place for a while; saw a young fellow with an Overland Coupe go in there and come out with a package and we apprehended that young fellow and found out what he had and he told us -

(Testimony of John H. Pelletier.)

MR DICKSON:

I am going to interpose an objection * * * *
THE COURT:

Yes, all right sustained.

THE WITNESS:

After we had determined * * * Officer Jones went up and knocked on the door and was admitted and some time after that, a few minutes after that he came out with a package and brought it over to the automobile where I was and then we had some discussion as to whether or not it would be advisable to make another buy or attempt to make another buy and Officer Jaffkey and Steckel went back there for the purpose of making another buy. Officer Jones and I stayed in the machine at the side of Fosella's house and of course I don't know what took place when they went back. * * * * We made a search for this "marked" \$5.00 bill and we could not find it. We then searched the place for liquor and found a considerable quantity of liquor, some five gallon demi-johns that had liquor in them and a number of bottles.

That the defendant's wife was present at the time; that after they started searching for the money they had her get out of bed and they looked in the bed, under the mattress, and in the bed for that \$5.00, but they didn't find it.

L. FOSELLA

Defendant, a witness for and in his own behalf, being first duly sworn, testified as follows:

(Testimony of L. Fosella.)

That he lived on Hawley Street in Gardena during the month of November, 1921 and was engaged in the business of buying and selling cows and in the dairy business. That on the night of November 5th, 1921, he heard a knock on the door, a few times at about two o'clock in the morning. That he went to the door and when he opened the same, four police officers came in; that they came into his place, searched him, searched his place, got three demijohns of wine which they took away. That they looked in his bed and every place for money, but they did not find the money. That he did not sell to Officer Jones or to anyone else any quantity of wine for any sum.

That he has lived in Gardena for four years and during the entire time he has been engaged in the dairy business; that at the time of the entry of the police officers there were two milkers in the house with him and his wife.

That the officers found a quantity of wine underneath the floor of his home; that he had had the same about two or three years. That the officers found a barrel of vinegar out in the barn. That the wine which the defendant had on his premises was made by him for his own use; that he did not know the fellow Herman about whom the officers testified; that he had never seen him.

THE COURT: When did you make this wine you had there?

(Testimony of L. Fosella.)

A Make long time ago. Can't make it all the time.

THE COURT:

When did you make this wine you had there in the house?

A Make about September, something like that.

THE COURT:

Last September?

A No, year ago September.

THE COURT:

Q A year ago September?

A Yes.

THE COURT:

Q Had it all that time? How much did you have?

A About fifteen gallons.

THE COURT:

How much did you make originally?

A Make fifty gallons.

THE COURT:

When was the last time you made it?

A Make it all one time.

THE COURT:

When was the last time you made it?

A Year before September.

THE COURT:

That was September, 1920?

A Yes sir.

(Testimony of D. McD. Jones.)

D. McD. JONES

Was recalled to the stand and testified that after the search warrant was served at the defendant's place the night of November 5th, that this wine in various lots was seized by virtue of the search warrant; that he made a test of the wine by taste; that he had made various tests of wine by tasting. That the liquor he tested the night of November 5th which was seized at the home of the defendant, contained over one-half of one per cent alcohol; that it was claret wine; that he knew it contained more than one-half of one per cent alcohol by the taste of it; that they seized and carried away three gunny sacks containing quarts, and gallons of wine, and two demi-johns of wine and one demijohn containing brandy.

JOHN G. PELLETIER

Was recalled to the stand and testified:

That he made a personal test of the liquid contents of several of the demijohns and bottles found at the home of the defendant on November 5th; that he tasted the liquor that was in the half gallon jar and then tasted some that was in one of the big five gallon demijohns, and tasted a quart bottle of wine. That such contents contained alcohol in excess of one-half of one per cent and was fit for beverage purposes. (It was stipulated that the witness was qualified to express opinion)

(Testimony of John G. Pelletier.)

That to the best of his knowledge, there were about thirty quarts of wine and three large demijohns taken from the defendant; that he sampled only one of the quart bottles and that he did not know what was in the other bottles.

R. E. STECKEL

Was recalled to the stand and testified:

That he tasted the contents of one five gallon demijohn which contained claret wine, containing alcohol in excess of one-half of one per cent; that the two or three other demijohns were not tasted by him but smelled, and that the smell was identical with claret wine.

HARRY HILL

A witness for and in behalf of the defendant, being first duly sworn, testified that he resided in the City of Los Angeles; that he knew the defendant, and had known him for nineteen months. That he had known him at his home near Gardena; that he knew people who lived about him; that he knew his reputation among his people with whom he associated and lived as a law abiding citizen; that that reputation was good.

D. J. O'LEARY

A witness for and in behalf of the plaintiff, being first duly sworn, testified as follows:

(Testimony of D. J. O'Leary.)

That he is a Federal Prohibition Agent; that he had been at the defendant's ranch three different times looking for a still. That he did not find a still, but that he found a quantity of liquor; that he never arrested the defendant.

Thereafter, the Court instructed the Jury as follows:

I will ask you to listen carefully, gentlemen, to the instructions of the Court:

The defendant is charged with three different violations of the National Prohibition Act; the first one involving the asserted sale to D. McD. Jones of a half gallon of wine containing alcohol in excess of one-half of one per cent., fit for beverage purposes, on or about the 5th of November, of last year, for the sum of three dollars; the second one charging the unlawful possession of three five-gallon demijohns of wine, a half-gallon bottle of wine, and three sacks containing a number of bottles of illicit liquor, all of which liquor then and there contained alcohol in excess of one-half of one per cent.; and the third count charging the maintenance of a nuisance, to-wit, a room, building and place at Vermont Avenue and Redondo Boulevard, this city, where intoxicating liquor for beverage purposes, to-wit, wine containing alcohol in excess of one-half of one per cent. was manufactured, kept, sold and bartered; all in violation of the statutes made and provided, and contrary to the peace and dignity of the United States.

The defendant's plea is not guilty, and it is for you to say whether or not the charge laid is true.

Now, the information that I have just read to you is, of course, no evidence of the defendant's guilt; it is a mere charge or accusation brought against him, and you are not to be prejudiced by it, or to consider it as any evidence; neither are you, if you are aware of the penalty provided by law for the commission of any of these offenses, to be at all concerned with, or controlled by them. Your duty is to say whether or not the man is guilty, whether or not he has violated the law, whether or not he has conducted himself as alleged in the information; and then it becomes the duty of the Court, upon consideration of all the circumstances, and with the obligation that rests upon the Court to protect the interests of society, to say what judgment, if any, shall be rendered upon the defendant, by virtue of a conviction, if you shall find him guilty—and you may, I think, in good faith rely upon the good judgment of the Court to be indulged in for the purpose of meeting the requirements of social security, if you should find the defendant guilty.

Is he guilty as charged?

You, gentlemen, are the exclusive judges of the facts in the case; you are the exclusive judges of the credibility of the witnesses; it is for you to say where the truth is in this case. Your power in this regard is not an arbitrary one, but is to be exercised with legal discretion, and in subordination to the rules of evidence, which will be given you by the Court.

In the Federal Courts it is the function, or the province, of the Court to express its opinion upon the evidence of the case, upon the merits of the controversy, and during the course of these instructions I may express some opinion to you upon the evidence introduced here, or the testimony received; but if I do, you are to understand and remember at all times that no expression of opinion coming from the Court with respect to the facts of the case is conclusive or binding upon you. It is your duty, out of the abundance of your own good sense, good judgment, good discretion, and experience as men, to say what the truth in the case is.

In passing upon the credibility of the witnesses, you will remember that every witness is presumed to speak the truth, but this presumption may be repelled by the manner in which a witness testifies; that is, if it is straightforward or halting, expressive of candor and frankness or suggestive of chicane or concealment. The presumption may be repelled by his appearance on the stand, by the character of his testimony, by the giving of false or perjured testimony, if any has been given; by his motives in the case, or his interest in the case—in the outcome, one way or the other; or by contradictory evidence.

So, also, a witness may be impeached by the party against whom he was called, by contradictory evidence, or by evidence given at other times inconsistent with his present testimony. If you believe any witness has been impeached, or that the presumption of truthfulness

ness attaching to the testimony of such witness has been repelled, then you may accord, or give, the testimony of such witness such degree of credibility, if any, as you may think it entitled to.

Now, the defendant has offered himself as a witness in the case here. That is his duty—it is his right, I mean to say—and you are to sit in judgment on his testimony in accordance with the same general rules that you might apply with respect to the testimony of others; looking to his manner, the character of his testimony, whether or not it is contradictory, the probability or improbability of it, and so forth, and, in addition to that, you are to weigh his testimony in the light of the fact that he is the defendant in the case, and his relation to the outcome of the case, and, in the consideration of all these things, place such a degree of credibility upon his evidence as you may feel it is entitled to.

You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, as against a less number, or against the presumption of other evidence satisfying your minds.

This being a criminal case, gentlemen, the guilt of the defendant, of course, must be established beyond a reasonable doubt, and the burden of establishing such guilt rests upon the government.

The defendant here has offered evidence, gentlemen, of the possession of a good reputation in the community with respect to the trait involved; that is, his

disposition to obey the law; and if you believe that he is possessed of a good reputation in that respect, this is a circumstance tending, in a greater or less degree, to the establishment of his innocence, and it must be considered in connection with all the other facts and circumstances of the case, and it may be sufficient in itself to raise a reasonable doubt of the defendant's guilt. But if, after full consideration of all the evidence adduced, the jury believes the defendant to be guilty of the crime charged, they should so find, notwithstanding the fact that proof of good character, with respect to the trait involved, may have been offered and admitted.

The law, gentlemen, presumes a defendant charged with a crime to be innocent until proven guilty beyond a reasonable doubt, and this presumption remains with the defendant, and will of itself avail to acquit him, unless it be overcome by proof of his guilt beyond a reasonable doubt, and if you can reconcile the evidence before you upon any reasonable hypothesis consistent with the defendant's innocence you should do so, and in that case find the defendant not guilty. A reasonable doubt, gentlemen, is a doubt based on reason, and which is reasonable in view of all the evidence; and if, after an impartial comparison and consideration of all the evidence, or from a want of sufficient evidence on behalf of the government to convince you of the truth of the charge, you can candidly say you are not satisfied of the defendant's guilt, then you have

a reasonable doubt, and you should acquit him. But if, after such impartial comparison and consideration of all the evidence, you can truthfully say you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt, and you should convict him.

By such reasonable doubt, gentlemen, you are not to understand that all doubt is to be excluded. It is impossible, in the determination of these questions, to be absolutely certain. You were not down there on this evening, the evening in question, and you cannot be absolutely certain as to what did take place. You are required to decide the questions submitted to you upon the strong probabilities of the case, and to justify a conviction the probabilities must be so strong as not to exclude all doubt or possibility of error, but as to exclude reasonable doubt.

When, after weighing all the evidence, you have an abiding conviction and belief that the defendant is guilty, it is your duty to convict, and no sympathy - sympathy for him, or for his family, or for his plight - justifies you in seeking for doubts by any strained or unreasonable construction or interpretation of law, or evidence, or facts.

The law, gentlemen, under which this prosecution is based, as I have indicated to you before, is the National Prohibition Act, which contains a number of

provisions not relevant to this controversy, and some that are. One is to the effect that:

“The word ‘liquor’ or the phrase ‘intoxicating liquor’ shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor.....by whatever name called, containing one-half of 1 per cent or more of alcohol by volume which are fit for use for beverage purposes.”

Then it is also provided that:

“No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect (The Court: Two years ago last January) manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.”

That really was the purpose of the amendment to the Federal Constitution, and the purpose of this law, which was enacted in furtherance of its practical enforcement. This forbids the manufacture, the sale, the possession of intoxicating liquor except as authorized in this Act, and the only exceptions authorized in the Act are the manufacture, or the sale, or the possession of liquor for non-beverage purposes; that is, for medi-

cinal purposes, for sacramental purposes, for scientific purposes, and the lawful possession of liquor in the home, to which I shall refer in just a moment.

There is no suggestion of any permit here. Any sale of that sort, or a manufacture, or a possession, for any of the purposes mentioned, would have to be pursuant to a permit. There is no permit here; we need not be concerned with that feature of the case.

Then it is also provided that:

“It shall be unlawful to have or possess any liquor or property designed for the manufacture of liquor intended for use in violating this title or which has been so used, and no property rights shall exist in any such liquor or property.”

Then it is provided further:

“After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title.”

the mere possession of it is prima facie evidence that it is wrongful possession, and the burden is on him who has possession to show the possession is a rightful one.

Then there is this provision, which I referred to a moment ago:

“But it shall not be unlawful to possess liquors in one’s private dwelling while the same is occu-

pied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."

Now, the possession in the home, to be a lawful possession, a rightful possession, of liquor, it must have been acquired lawfully, and if the liquor was manufactured in violation of law at a time when the Eighteenth Amendment was in force, that feature of the law forbidding the manufacture of liquor, then there could not be lawful possession of it, even in the home.

So now, gentlemen, the question for you to determine upon the evidence here is really a very simple one - a simple question.

These officers testified - one of them - that a purchase was made from the defendant for the sum of three dollars of a gallon, or a half gallon, of this wine that was in this house there. The defendant denies that; he says there was no purchase. You will remember he testified that nobody else came to his home that night except that these four officers came at one time and thrust themselves in there, at about two o'clock in the morning. Now, of course,

if you believe the story of the defendant, that he did not make any sale, and believe the story of the defendant to the effect that the wine was there for his own use only, then, of course, he could not be guilty of maintaining a nuisance, or could not be guilty of making a sale; although he could be guilty of having unlawful possession of wine which had been unlawfully manufactured. But, of course, the main question in the case is the question of sale, because upon that would hinge the question of the maintenance of the nuisance, with which he is charged on one count in the information.

You have the denial of the defendant that he made the sale, and, as opposed to that, you have the positive testimony of the officer that the sale was made, and the testimony of the other officers that one of them went in while they waited outside, and came back, and they saw some sort of a transaction occurring there at the front door.

Now, the proposition to be considered by you is a very simple one. Are you going to accept the testimony of the defendant, and refuse to accept the testimony of these officers? You cannot believe the two stories. They cannot be consistent; they are not consistent. The defendant denies that anybody came there until the four officers came all together; the officers testified that one went there first and made a purchase. Now, to accept the defendant's story you have got to disbelieve the testimony of the officers. Is there anything in the case which justifies you in disbeliev-

ing the testimony of these police officers? Has there anything developed here which would make it seemingly in keeping with your duty? Is there anything in the nature of their testimony, or the improbability of it, or the unreasonableness of it, in the conduct of the officers, the position they hold; or has anything taken place: is there anything to justify you in coming to the conclusion that these officers have deliberately perjured themselves on the stand? Because that really is the conclusion you must come to if you accept the statement of the defendant. Of course, if you do, if you believe he told the truth and that they committed perjury, then you ought to acquit him. If, however, you believe they told the truth, and that he failed to tell the truth, then you ought to convict him; because by this law he would be guilty if you believe the statements made by the officers as to what took place.

So I say, it is just a question, gentlemen, of whom you are going to believe in your consideration of the cause, and what your good judgment, and your consciences, and your sworn declaration that you will obey, and uphold, and enforce, the law of the land, with respect to everybody, tell you to depend upon - the view you take of the situation - as to what your conclusion will be.

Of course, there is no doubt about this at all: that if there be that in the testimony of the defendant, considered in connection with all of the circumstances in the case, and considered in connection with the testi-

mony of other persons, that causes you to entertain a reasonable doubt as to what took place there, or as to his guilt, it is your duty to return a verdict of not guilty. No question about that. In this Court it will not be permitted, insofar as we can prevent it, for any man to be convicted or adjudged guilty wrongfully. There is no question as to that. But at the same time, while you owe a duty to the defendant in that behalf, you owe another duty to society in the event the proof adduced and the testimony convince you beyond a reasonable doubt, as reasonable men, of the guilt of the defendant, by finding a verdict of guilty.

Now, a good deal was said in argument about other amendments—something said about other amendments to the Constitution. There are none of them involved here. There is no question of a search warrant being involved here. No officer of the United States Government was in any wise concerned with this, and it is only officers of the United States Government whose misuse of a search warrant may be inquired into in this Court. There is nothing of that in the case at all.

As to the search warrant, presumably it was valid. They went to get it, and the judge issuing it, without doubt, acted upon proper and adequate information, in a judicial capacity.

So there is no suggestion here of any violation of anybody's constitutional rights. If there was that which justified the issuance of a search warrant, and justified these men going to that man's house under the circumstances to see if the law was being violated,

that matter is of no concern in this case; it does not arise in this particular case.

So also the question about the use of the revolver. It could easily be true that a man bidden to come from his bed in the middle of the night might, not unnaturally, might, not unrighteously, assume or contemplate some attack upon him, or robbery—one or the other. That could easily be true, and it might be that this man would have ample justification for possessing and providing himself at that time with a revolver; but that hasn't anything to do with this case. The question is, did this defendant make and sell to the witness Jones, before a search warrant was talked about, or before the revolver was thought of, liquor unlawfully? If he did, and you believe it beyond a reasonable doubt, you ought to convict him. If you have a reasonable doubt of it, of course it is your duty to acquit him.

Any exceptions to the charge?

MR. MEADER: No exceptions.

MR. DICKSON: No exceptions.

Thereafter the Jury returned a verdict of "Guilty" upon all three counts of the information herein.

Thereafter the Court sentenced the defendant to imprisonment in the County Jail of Orange County for a period of six months on the first count of the information herein, and to imprisonment in the County Jail of Orange County for six months on the third count of information herein, and imposed a fine of \$500.00 on the second count of the information herein, the de-

fendant to stand committed to the Orange County Jail until the fine was paid. The sentence on the first and third counts not to run concurrently.

Thereafter the defendant served and filed within the time required by law, and in the manner required by law, his petition for writ of error, which said petition was filed on the 27th day of April, 1922.

That thereafter and on the 27th day of April, 1922, the defendant prepared, served and filed his assignment of errors.

That said bill of exceptions contains all of the evidence received and heard by the court in said case, and contains the proceedings on the trial of said cause as aforesaid, and the same is hereby settled and allowed this 26 day of May, 1922.

Bledsoe
District Judge.

It is stipulated that said Bill of Exceptions contains all the evidence received by the Court, and all proceedings on the trial of said cause.

Received copy of said bill of exceptions May 26th, 1922.

J. C. BURKE, U. S. District Attorney,
By Mack Meader,
Assistant U. S. District Attorney.

[Endorsed]: No. 3831, Cr. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS FAS-

SOLLA, charged as Louis Fosella, Defendant. BILL
OF EXCEPTIONS Filed May 26, 1922. CHAS. N.
WILLIAMS, Clerk By Murray E Wire Deputy

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

UNITED STATES OF AMERICA,	)	Cr. 3831, S. D.
)	
Plaintiff,)	
)	
vs.	)	AT LAW
	)	ASSIGNMENT
LOUIS FASSOLLA, charged	)	OF ERRORS.
as Louis Fosella,)	
)	
Defendant.)	

The defendant in this action in connection with his petition for writ of error, makes the following assignment of errors, which he avers occurred upon trial of the cause:

1. The court erred in using the following language in the charge to the jury:

"Now a good deal was said in argument about other amendments; something said about other amendments to the Constitution. There are none of them involved herein. There is no question of a search warrant being involved. No officer of the United States Government was in anywise concerned with this and it is

only officers of the United States Government whose misuse of a search warrant may be inquired into in this court. There is nothing of that in the case at all."

2. The court erred in using the following language in the charge to the jury:

"So there is no suggestion here of any violation of anybody's constitutional rights."

3. The said court erred in using the following language in the charge to the jury:

"The question is did this defendant make and sell to the witness, Jones, before a search warrant was talked about or before a revolver was thought of, liquor unlawfully. If he did and you believe it beyond a reasonable doubt, you ought to convict him."

4. The court erred in instructing the jury to convict on each of the three counts of the information if they believed the defendant guilty of the separate acts as laid in the information in that the same evidence is offered in suppoert of the three counts.

5. The court erred in instructing the jury that they should convict the defendant on the count charging unlawful nuisance and unlawful sale and unlawful possession when the proof offered was as to one act.

6. The court erred in using the following language in the charge to the jury:

"But, of course, the main question in the case is the question of sale because upon that would hinge the question of the maintenance of the nuisance, with which he is charged on one count of the information."

7. The evidence is insufficient to support the verdict of guilty and the sentence imposed in that the evidence shows a single unlawful act which is insufficient to support a verdict of guilty on more than one of the counts as laid in the information.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

Leo V Youngworth

Harry J McClean

Attorneys for Defendant

[Endorsed]: Cr. 3831, S. D. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS FAS-SOLLA, charged as Louis Fosella, Defendant. AT LAW ASSIGNMENT OF ERRORS. Filed Apr 27 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy LEO V YOUNGWORTH HARRY J. McCLEAN 602 Mer. Nat'l. Bk. Bldg., Attorneys for Defendant

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	Cr. 3831, S. D.
)	
Plaintiff,)	
	)	PETITION
vs.	)	FOR WRIT OF
LOUIS FASSOLLA, charged	)	ERROR AT
	)	LAW
as Louis Fosella,)	
)	
Defendant.)	
)	

And now comes Louis Fassolla, defendant herein, and says that on or about the 18th day of April, 1922, this court entered judgment herein against the defendant whereby the defendant was sentenced to imprisonment in the County Jail of Orange County for a period of six (6) months on the first count of the information herein, and in the County Jail of Orange County for a period of six (6) months on the third count of the information herein, and to pay a fine of Five Hundred Dollars (\$500) on the second count of the information herein, and stand committed to the said County Jail of Orange County until the said fine is paid. The said sentence of imprisonment to run consecutively; and in which said judgment and the proceedings had thereunto in this cause certain errors were committed to the prejudice of this defendant, all

of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States District Court for the Southern District of California, Southern Division, to the Circuit Court of Appeals for the Ninth Circuit, for the many errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

Leo V Youngworth

Harry J. McClean

Attorneys for Defendant

[Endorsed]: Original Cr. 3831, S. D. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS FASSOLLA, charged as Louis Fosella, Defendant. PETITION FOR WRIT OF ERROR AT LAW Filed Apr 27 1922 CHAS. N. WILLIAMS, Clerk By R S Zimmerman Deputy LEO V. YOUNG WORTH, HARRY J. McCLEAN 602 Mer. Nat'l. Bk. Bldg. Los Angeles Attorneys for Defendant

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,)

Plaintiff,)

vs.)

LOUIS FASSOLLA, charged)
as Louis Fosella,)

Defendant.)

Cr. 3831, S. D.

ORDER

This 28th day of April, 1922, came the defendant, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises, in consideration whereof, the court does allow the writ of error upon the defendant giving bond according to law in the sum of \$1000.00 which shall operate as a supersedeas bond, and upon the defendant giving bond according to law in the further sum of \$250.00 for costs.

4-28-22

Trippet
District Judge

Approved as to form as provided in Rule 45,

J. C. BURKE,

U. S. District Attorney,

By Mack Meader

. Ass't. U. S. District Attorney

Bail in the sum of \$1000.00 approved Mack Meader
Asst. U. S. Atty.

[Endorsed]: Original Cr. 3831, S. D. IN THE
DISTRICT COURT OF THE UNITED STATES,
IN AND FOR THE SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN DIVISION UNITED
STATES OF AMERICA, Plaintiff, vs. LOUIS
FASSOLA, charged as Louis Fosella, Defendant.
ORDER Filed Apr 28 1922 CHAS. N. WILLIAMS,
Clerk By R S Zimmerman Deputy Clerk LEO V.
YOUNG WORTH HARRY J. McCLEAN 602 Mer.
Nat'l. Bk. Bldg. Los Angeles Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

UNITED STATES OF AMERICA,)	
)	
	)	Plaintiff,
)	
vs.	)	Cr. 3831, S. D.
)	
	)	SUPERSEDEAS
	)	BOND
LOUIS FASSOLLA, charged)	
as Louis Fosella,)	
)	
)	
Defendant.)	

KNOW ALL MEN BY THESE PRESENTS:
That we Louis Fassolla, as principal, and cash, as

sureties, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of Twelve Hundred and Fifty (\$1250.00) Dollars, lawful money of the United States of America, which we have deposited herewith, upon the following conditions:

WHEREAS, the said Louis Fassolla has sued out a writ of error in judgment of the District Court of the United States, for the Southern District of California, Southern Division, in the case in said court wherein the United States of America are plaintiffs, and the said Louis Fassolla is defendant, for review of said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

Now, if the said Louis Fassolla shall appear and surrender himself in the District Court of the United States, for the Southern District of California, Southern Division, on and after the filing in the said District Court of the mandate of the said Circuit Court of Appeals and from time to time thereafter as he may be required to answer any further proceedings and abide by and perform any judgment or order which may be had or rendered therein in this case and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise, to remain in full force and virtue.

WITNESS our hands and seals this 28 day of April, A. D., 1922.

(Seal)

Louis Fassolla SEAL)

Subscribed and sworn to before me this 28th day of April, 1922.

Chas. N. Williams, Clerk

U. S. District Court Southern District of California

By R. S. Zimmerman,

Deputy.

Taken and approved this 28 day of April, 1922, before me.

Trippet

District Judge.

Examined and Recommended for approval as provided in Rule 29.

Leo V Youngworth

Attorney at law

O. K.

Mack Meader

Asst. U. S. Atty.

[Endorsed]: Original Cr. 3831, S. D. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS FASSOLLA, charged as Louis Fosella, Defendant. SUPERSEDEAS BOND Filed Apr 28 1922 at —min. past —o'clock — M CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy Leo V. Youngworth Harry J. McClean 602 Mer. Nat'l. Bk. Bldg. Los Angeles Attorneys for Defendant.

IN THE DISTRICT COURT OF THE UNITED
STATES IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	Cr. 3831, S. D.
)	
Plaintiff,	)	ORDER
	)	PERMITTING
vs.	)	CASH
	)	DEPOSIT
LOUIS FASSOLLA, charged	)	IN LIEU OF
as Louis Fosella,	)	BOND.
)	
Defendant.)	
)	

The defendant having sued out a writ of error herein to remove this cause to the Circuit Court of Appeals for the Ninth Circuit to review the judgment entered herein on the 18th day of April, 1922,

IT IS HEREBY ORDERED that he may deposit \$1000.00 in lawful money of the United States with the Clerk of this Court in lieu and operative as a supersedeas bond on said writ of error;

AND IT IS FURTHER ORDERED that he may deposit \$250.00 in lawful money of the United States with the Clerk of this Court in lieu of bond as security for costs of said writ of error.

Dated this 28 day of April, 1922.

Trippet
District Judge

[Endorsed]: Cr. 3831, S. D. Original IN THE
DISTRICT COURT OF THE UNITED STATES,

IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS FASSOLLA, charged as Louis Fosella, Defendant. ORDER PERMITTING CASH DEPOSIT IN LIEU OF BOND. Filed Apr 28 1922 at — min. past — o'clock — M CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy Leo V. Youngworth Harry J. McClean 602 Mer. Nat'L Bk. Bldg. Los Angeles Attorneys for Defendant

UNITED STATES OF AMERICA
DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)	CLERK'S OFFICE
)	
Plaintiff,)	
)	
vs.)	No. Cr. 3831, S.D.
)	
LOUIS FASSOLLA, charged)	
as Louis Fosella,)	
)	
Defendant.)	PRÆCIPE
)	

TO THE CLERK OF SAID COURT:

Sir:

Please prepare and make return to the writ of error herein and make copies of the following papers on file in your office

1. The information in full;
2. The minutes of trial including verdict;

3. Judgment;
4. Bill of exceptions;
5. Assignment of errors;
6. Petition for writ of error;
7. Order granting writ of error;
8. Citation on writ of error;
9. Writ of error;
10. Supersedeas bond;
11. Bond for costs;
12. Praecipe.

Certify to this record and return with the original writ of error.

Dated this 27th day of April, 1922.

Leo V Youngworth

Harry J. McClean

ATTORNEYS FOR PLAINTIFFS IN ERROR

[Endorsed]: Service of the within praecipe admitted this 17th of May, 1922.

Joseph C Burke

U. S. District Attorney

By Mack Meader

Ass't. U. S. District Attorney

No. Cr. 3831, S. D. U. S. District Court SOUTHERN DISTRICT OF CALIFORNIA UNITED STATES OF AMERICA, Plaintiff, vs. LOUIS FASSOLLA, charged as Louis Fosella, Defendant. PRÆCIPE FOR Record of proceedings in error. Filed May 19 1922 at — min. past — o'clock — M CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy

IN THE DISTRICT COURT OF THE UNITED
STATES, SOUTHERN DISTRICT OF
CALIFORNIA, SOUTHERN
DIVISION.

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
	)	CLERK'S
vs.)	
	)	CERTIFICATE
LOUIS FASSOLLA,)	
)	
Defendant.)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 56 pages, numbered from 1 to 56 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by Plaintiff in error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, information, verdict, judgment, bill of exceptions, assignment of errors, petition for writ of error, order granting writ of error, supersedeas bond and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the plaintiff in error herein.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the Seal of the Dis-
trict Court of the United States of America,
in and for the Southern District of Cali-
fornia, Southern Division, this *20th* day
of *June*, in the year of our Lord
One Thousand Nine Hundred and Twenty-
~~one~~, and of our Independence the One Hun-
dred and Forty-sixth.

CHAS. N. WILLIAMS,
Clerk of the District Court of the
United States of America, in and
for the Southern District of Cali-
fornia.

By

R. L. Zimmerman
Deputy.

[Seal]

8228 11

IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louis Fassolla, charged as Louis Fos-
ella,

Plaintiff in Error,

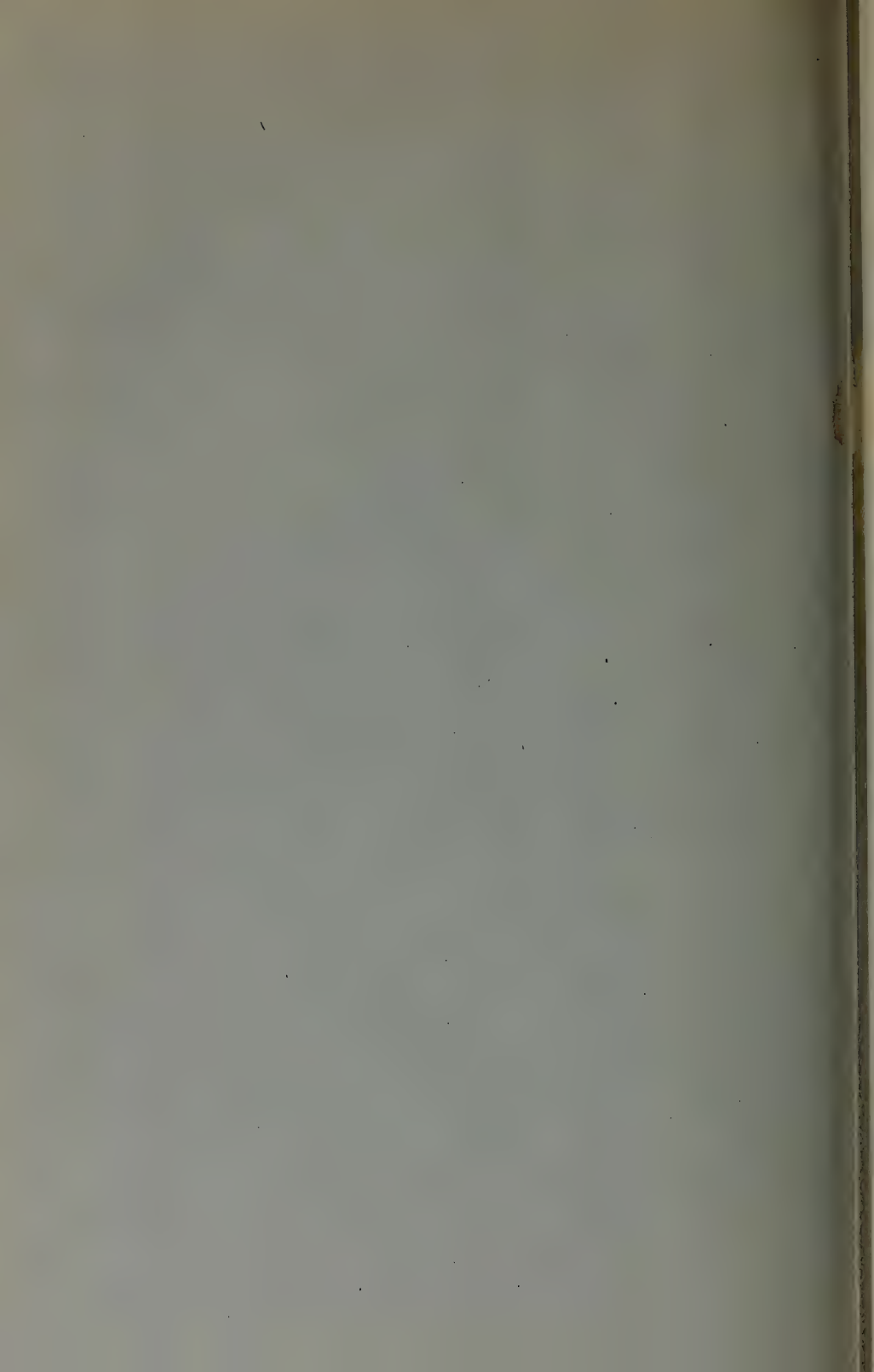
vs.

United States of America,

Defendant in Error.

BRIEF BY PLAINTIFF IN ERROR.

LEO, V. YOUNGORTH,
HARRY J. McCLEAN,
Attorneys for Plaintiff in Error.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louis Fassolla, charged as Louis Fos-
ella,

Plaintiff in Error,

vs.

United States of America,

Defendant in Error.

BRIEF BY PLAINTIFF IN ERROR.

An examination of the bill of exceptions reveals the following state of facts:

1. The plaintiff in error sold a half gallon of wine to officers of the law. [Tr. p. 19.]

2. The sale took place in the home of the plaintiff in error, which said place, at the said time, was used solely as the dwelling place of the plaintiff in error and his wife. [Tr. pp. 18, 22, 23, 25 and 26.]

3. That a quantity of intoxicating liquor was found in the home and seized and taken by the officers. [Tr. pp. 19 and 26.]

The plaintiff in error stands convicted by a general verdict of guilty upon all three counts of the information herein. The first count alleges the unlawful sale of one-half gallon of wine. The second count alleges unlawful possession of thirty-five gallons of wine, etc. The third count alleges the maintaining of a common nuisance. [Tr. pp. 7 and 9.] It will be conceded by the defendant in error that there was only one sale of intoxicating liquor. Therefore, the defendant in error predicates the first and third counts (sale and nuisance) upon the sale of one-half gallon of wine. The count on possession is predicated upon the wine found and seized in the home of the plaintiff in error.

Plaintiff in error complains that the court erred in instructing the jury that they should convict him on the counts charging unlawful sale and unlawful possession when the only proof offered was as to one unlawful act, namely, sale. Consideration will be given to each count of the information as the same are presented in the information.

Plaintiff in error submits that the evidence is insufficient to sustain the verdict of guilty on the first count of the information herein, charging sale. An examination of the bill of exceptions will reveal that there is a direct and positive conflict in the evidence as to the sale transaction. It will be observed that the corroborating evidence relied upon by the defendant in error fails. [Tr. pp. 20 to 25.] This conflict in the evidence, viewed in connection with the presumption of innocence which is evidence in favor of the accused,

and in corroboration of his testimony, must lead to the conclusion that the verdict of guilty on the first count of the information herein is absolutely unsustained by the evidence,

The second count alleging unlawful possession is not supported by the evidence and the conviction on the second count of the information herein must be reversed. The fact is undisputed that the liquor which was seized was kept and possessed by the plaintiff in error in his own home and, the presumption must be indulged, legally, for his own use and that of his *bona fide* guests. It is this fact which distinguishes this case from many reported cases in which the liquor was kept in a place of business or some place other than the home or place of dwelling of the accused. Section 33 of article 2 of the National Prohibition Act reads, in part:

“But it shall not be unlawful to possess liquors in one’s private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his *bona fide* guests when entertained by him therein.”

The burden of proof, which is placed upon the possessor by the same section, was sustained by the plaintiff in error. [Tr. pp. 25 and 26.]

The case of *United States v. Crossen*, 264 Fed. 459 (Pennsylvania, 1920) is instructive on this point. The court said:

“It follows that the relator in her petition has established a *prima facie* right to own and possess liquors in the premises in question, because she was not using the premises for the purpose of conducting the saloon but they were occupied by her as her dwelling only. This conclusion is arrived at with some reluctance, because of the provisions of section 3 which prohibit possession except as authorized in the act, and provide for a liberal construction of all its provisions, to the end that the use of intoxicating liquor as a beverage may be prevented. Liberal construction, however, does not justify the court in extending the prohibitive provisions of the act beyond what is plainly stated, nor omitting language which would change its plain meaning. Section 3 prohibits possession ‘except as authorized in this act’. Section 33 contains one of the exceptions authorized. Congress has made this exception apply to any one possessing liquor in a private dwelling while used and occupied by him (or her) as his (or her) dwelling, only * * *.”

The case of *Rose v. United States*, 274 Fed. 245, is to the same effect; also *United States v. Murphy*, 264 Fed. 842.

There is also another ground for the reversal of the conviction on the second count alleging unlawful possession. The plaintiff in error submits that that provision of the National Prohibition Act which declares

the act of possession a crime is illegal and unconstitutional and therefore void. Counsel for the plaintiff in error have carefully read the decision of this court in the case of *Page et al. vs. United States*, 278 Fed. 41, in which the Circuit Court of Appeals, for the Ninth Circuit, holds that the particular provision of the National Prohibition Act is sustainable on the ground that it is necessary for the carrying into execution of the other powers vested by the United States Constitution in the Government of the United States. This raises a question that was early discussed and in a masterful way disposed of by Marshall, in the case of *McCulloch v. Maryland* (4 Wheat. 316). Counsel for the plaintiff in error do not assume the position of questioning the validity or the soundness of the principle declared by the great Chief Justice and as applied to that case such declaration of principle is absolutely unimpeachable. The question for the court to determine is, however, in the last analysis whether the means adopted by Congress are appropriate and adapted to the end sought and whether such means are also consistent with the Constitution and are not prohibited. Starting with this premise, we very earnestly submit that that provision of the National Prohibition Act is unconstitutional and absolutely void. It is elemental that Congress would have no power to declare the possession of intoxicating liquor a criminal act. It has generally been conceded that the mere ownership or possession of intoxicating liquor is not a crime except perhaps in the furtherance of a state monopoly.

(State v. McIntyre, 139 N. C. 599.) The National Prohibition Act manifestly rests upon the Eighteenth Amendment for its validity and constitutional support. The Eighteenth Amendment is absolutely silent in its authorization to Congress to enact any law punishing as a criminal act the mere possession of intoxicating liquor. We contend that Congress had no authority to write into the National Prohibition Act the provision making it criminal to merely possess intoxicating liquor and that the extent of the authority of Congress was to adopt appropriate means to enforce the power given to Congress by the Eighteenth Amendment. We also contend that making possession criminal is not an appropriate means or one plainly adapted to that end, but that it creates substantively a new, separate and distinct offense. We further contend that, tested by the rule laid down by Marshall in *McCulloch v. Maryland*, the provision is not within the category of "necessary and proper laws" for the reason that the law making the mere possession of intoxicating liquor a crime is prohibited in that Congress has no power in the premises except such as is expressly delegated to it. We submit that the only authority which Congress has to regulate the matter of possession of intoxicating liquor is to declare that possession shall be *prima facie* evidence of the offenses declared illegal by the National Prohibition Act as authorized by the Eighteenth Amendment. This Congress has done in a measure. More than this it has no authority to do.

In the case of United States v. Dowling, 278 Fed. 630, the court said:

“From the foregoing discussion of these counts it is apparent that the bare possession of intoxicating liquors is all that is charged. No accompanying facts are alleged to show that such possession was unlawful either on account of the time, place or purpose of the possession or of the character of the liquor. The Eighteenth Amendment to the Constitution is in these words:

“‘After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation from the United States and all territory subject to the jurisdiction thereof, for beverage purposes is hereby prohibited.’

“This amendment is at once the law forbidding the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, and at the same time it is a grant of plenary power to Congress to enact legislation appropriate for its enforcement. The amendment does not *proprio vigore* provide the means for making it effective; that duty is conferred upon the Congress, and within the scope of the amendment the legislative branch can enact such laws as it may deem proper. Of course the Congress cannot transcend the fundamental law or the delegated power. The amendment does not authorize the Congress to so legislate as to denounce the bare intrastate possession of intoxicating liquors. To do this would be an illegal protrusion. The words, ‘for beverage purposes’ of the amendment, are as plain and important as any other

words of the amendment, and they are inseparable from the other words. They qualify 'manufacture,' 'sale,' 'transportation,' 'importation,' and 'exportation.'

"However, I think the Congress has the power to prohibit the possession of intoxicating liquors, if the possession is inhibited for the purpose of rendering effective the expressed prohibitions of the amendment; but the Congress cannot do so for the purpose of adding a new prohibited act to the fundamental law. It is clear that the Congress is without authority to make the mere possession of intoxicating liquors—possession stripped of every other fact or incident—a crime. The amendment neither by expression nor implication denounces the simple possession of intoxicating liquors. The possession is lawful unless it be coupled with illegal 'manufacture' or 'sale' or 'transportation' or 'importation' or 'exportation'.

"I am not advised that any court has passed directly upon this question, but I think the decision in *U. S. v. Jin Fuey Moy*, 241 U. S. 394, loc. cit. 401, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, is at least persuasive, if not conclusive, of the correctness of the view above advanced. There the court said:

" 'If opium is produced in any of the states, obviously the gravest question of power would be raised by an attempt of Congress to make possession of such opium a crime.'

"Of course the Eighteenth Amendment does not apply to opium; but, as it has been said, the amendment does not denounce as unlawful mere possession of intoxicating liquors. nor does the language

of the amendment authorize the Congress to make the mere possession of intoxicating liquors a crime, as I have attempted to show.”

It appears from the second count of the information herein that the defendant in error also seeks to sustain the judgment of conviction upon the one-half gallon of wine which was sold to the officers of the law. [Tr. p. 7.] It therefore appears that the one act of sale predicates the first count and in part the second count and the third count entirely. We have considered the effect of the possession alleged in the second count of the information. The conclusion, which we believe to be sound, is that the possession in the home of the plaintiff in error for his own use and that of his guests was not illegal and therefore the conviction must be reversed.

The next question to which consideration must be given is whether a single illegal act will support a conviction for each of the three counts in the information herein. We submit that it cannot support more than one count. Three counts of the information are supported by the same evidence as to the same single unlawful act and therefore the conviction on one count is a bar to the conviction on the other counts. This raises a question similar to the one raised in the case of *Page v. United States*, 278 Fed. 41. decided by this court in January, 1922. The facts in the case at bar are clearly distinguishable from the facts in the *Page* case. In the *Page* case, there was competent evidence

of *other sales* made on the premises there in question, which premises were the meeting place of a social club. In the case at bar, there is absolutely no evidence of any other sales and the place was the home of the plaintiff in error. This leads to a consideration of what constitutes a nuisance under the National Prohibition Act. This court has already held that a single unlawful act of possession will not support a count charging the maintaining of a common nuisance (Page v. U. S., 278 Fed. 41), and by strong implication held in the same case that a single unlawful sale would not establish the charge of maintaining a common nuisance. This view is that adopted in the case of U. S. v. Schott, 265 Fed. 429. There the court said:

“Congress had in mind as a possibility what the developed facts of this case show that a defendant charged with the violation of the law might persist in making *further* unlawful sales while awaiting trial. To meet such a situation the Volstead Act declares the place at which such *sales are* made to be a public nuisance, and may be abated, as may any other nuisance. * * *

“The present proceeding is to have such injunction issue. * * * All that is called for is the *prima facie* finding now made that illegal *sales* of liquor have been made at the place complained of as a nuisance, for which the defendant is now under arrest, and that illegal sales have been made at the same place since the arrest * * *.”

It clearly appears, therefore, that a common nuisance consists in the maintaining of a place where in-

toxicating liquor is manufactured, sold or bartered in violation of the law. In the case at bar, there is the single unlawful sale. There is no evidence of other sales. There is no evidence that the liquor found on the premises was for the purpose of sale, but, on the contrary, the presumption must be indulged that it was in his home for his own use and the use of his *bona fide* guests as permitted by law, and since in this jurisdiction a presumption of law is considered evidence in the case, it must be held that there were no other sales and that the liquor was not held or possessed except as permitted by law. It is equally untenable to say that the liquor which was found there, as alleged in the second count, would constitute a nuisance for the reason that the keeping must be for sale or for other commercial purpose, and the strict and positive evidence in this case is that the liquor was kept there for his own use and the only evidence to the contrary is that of one sale upon which the first count in the information was predicated. In the case of *United States v. One Cadillac Touring Car*, 274 Fed. 470, the court said:

“The contention of the Government that the automobile is subject to forfeiture as a common nuisance under the provisions of section 21 of the National Prohibition Act, * * * is clearly without merit. As it does not appear, and is not alleged by the Government, that intoxicating liquor was manufactured, sold or bartered in said automobile, or kept therein for such a purpose, and the word ‘kept’ as used in section 21 just quoted,

refers to keeping for sale or for other commercial purpose.”

The United States Supreme Court in the case of *Street v. Lincoln Safe Deposit Company*, 41 Sup. Ct. Rep. 31 (10 A. L. R. 1548), has given very careful consideration to the question of unlawful possession and the maintaining of a common nuisance. The concurring opinion by Justice McReynolds is enlightening upon the subject of authority granted by the Eighteenth Amendment, wherein he says:

“The Eighteenth Amendment gave no such power to Congress (virtual confiscation of lawfully acquired liquor.) Manufacture, sale and transportation are the things prohibited—not personal use.”

The majority opinion holds that “the word ‘kept’ plainly means for sale or barter or other commercial purpose.”

We submit, therefore, that there is but a single unlawful act in the case at bar. That unlawful act is the alleged sale of one-half gallon of liquor to the officers of the law. That one act will predicate only the count of unlawful sale. There is no evidence of maintaining a nuisance. There is no evidence of unlawful possession, even assuming the constitutionality of the particular provision of the National Prohibition Act. It will be noted that trial counsel for the plaintiff in error saved no exceptions. It is of course well established that the Circuit Court of Appeals will

reverse the record where no exceptions are reserved or proceedings had to correct the error in the District Court in a criminal case, where the life or liberty of a person is at stake and the court will not sit by and allow error to prejudice the rights of an accused even though no technical exceptions are reserved at the time.

Sykes v. U. S., 204 Federal 909;
Humes v. U. S., 182 Federal 485;
Fielder and others v. U. S., 227 Federal 832;
Gillette v. U. S., 236 Federal 215;
Clyatt v. U. S., 197 U. S. 207;
Crawford v. U. S., 213 U. S. 183;
Wiborg v. U. S., 163 U. S. 632;
Pettine v. Territory of New Mexico, 201 Federal 489.

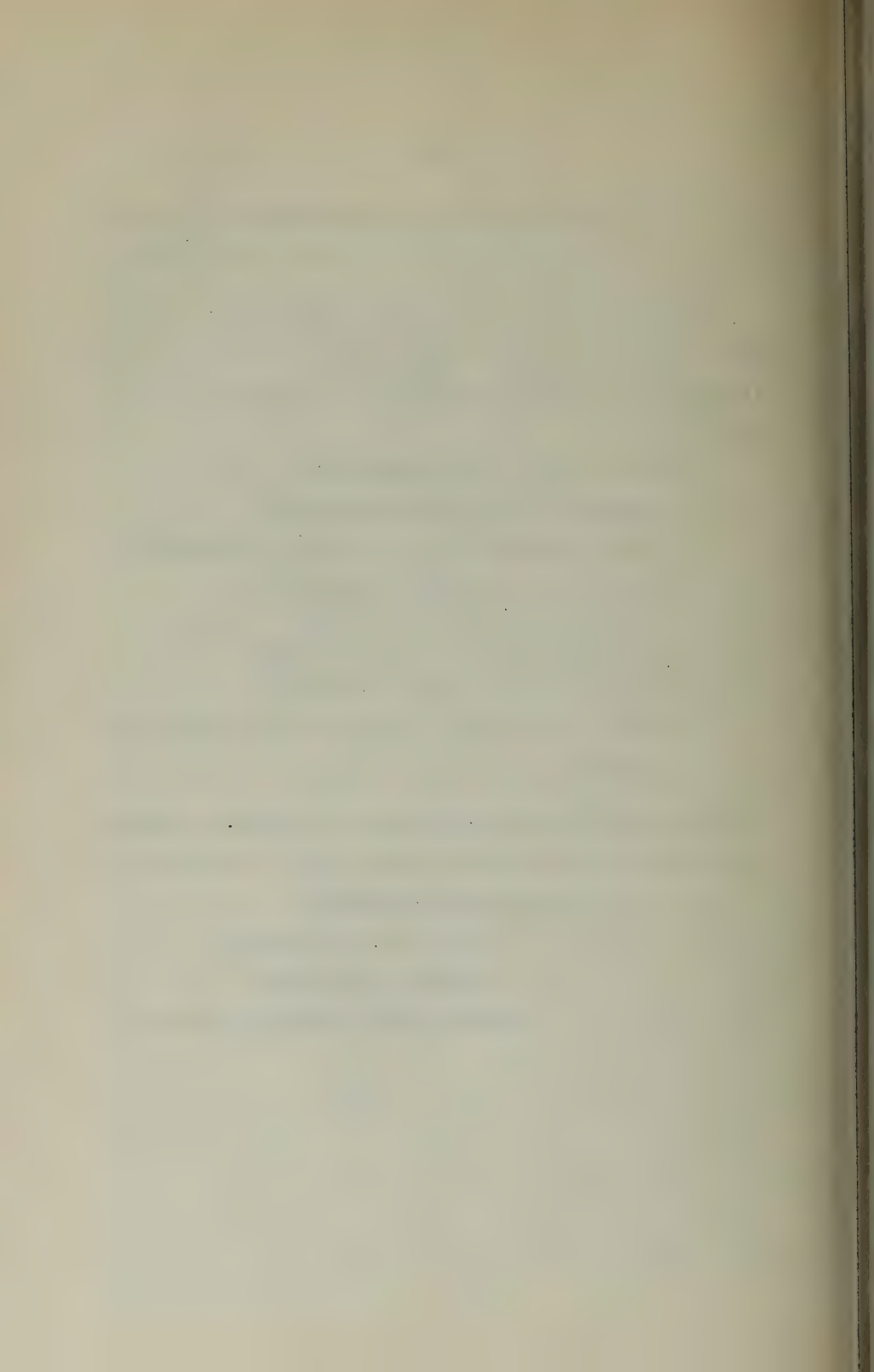
We submit that the judgment of conviction should be reversed as to all of the counts. and we so pray.

Respectfully submitted,

LEO V. YOUNGORTH,

HARRY J. McCLEAN,

Attorneys for Plaintiff in Error.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louis Fassolla, charged as Louis Fo-
sella,

Plaintiff in Error,
vs.

United States of America,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

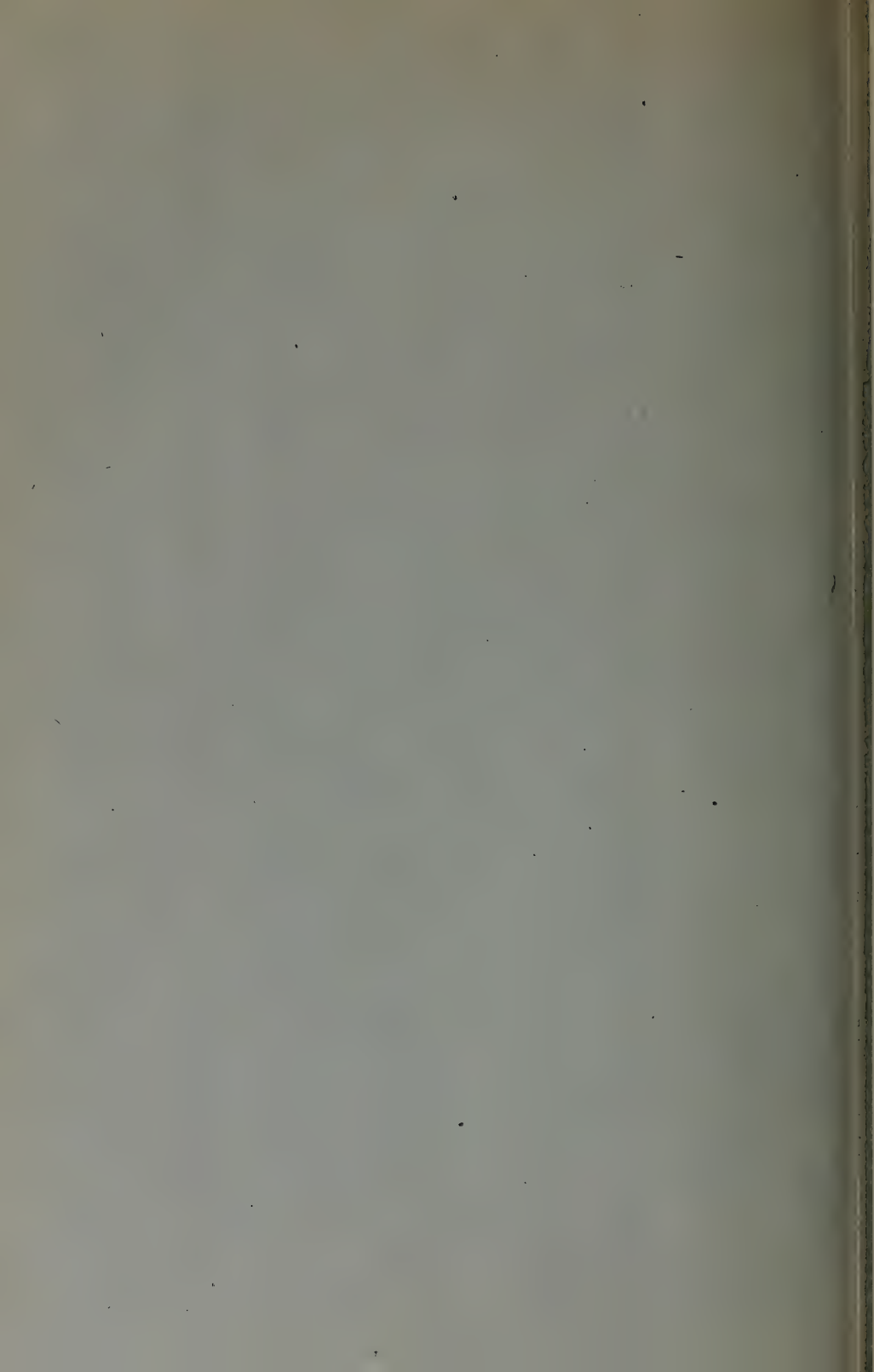
JOSEPH C. BURKE,

United States Attorney,

MACK MEADER,

Assistant U. S. Attorney,

Attorneys for Defendant in Error.



IN THE
United States
Circuit Court of Appeals,
FOR THE NINTH CIRCUIT.

Louis Fassolla, charged as Louis Fossella,	}
<i>Plaintiff in Error,</i>	
<i>vs.</i>	
United States of America,	
<i>Defendant in Error.</i>	}

BRIEF OF DEFENDANT IN ERROR.

The assignments of error by plaintiff in error are seven in number, the first six alleging error in various instructions of the court to the jury and the seventh alleging that the evidence was insufficient to support the verdict and the sentence imposed "in that the evidence shows a single unlawful act which is insufficient to support a verdict of guilty on more than one of the counts as laid in the information."

Without entering into any discussion of the merits of the first six assignments of error, we deem it sufficient to say that there was no exception taken to the court's charge to the jury. [Tr. p. 41.]

Taking up assignment of error number seven, to-wit: the assignment covering the insufficiency of the evi-

dence, we respectfully contend that counsel for plaintiff in error is under a misapprehension when he insists that there was only one sale in evidence in this case. Officer Jones in direct examination testified that in company with police officers Steckel, Jaffkey, McCarthy and Captain Pelletier, he arrested the occupants of an automobile which contained about one-half gallon liquor, at about nine o'clock on the evening of November 5th, which liquor was purchased from Louis Fossolla [Tr. pp. 18 and 19]. This is corroborated by the testimony of Officer Steckel [Tr. p. 22].

There is also evidence of the unlawful manufacture of the wine found on the premises of the defendant [Tr. pp. 25 and 26]. This is the direct testimony of plaintiff in error and it is contended that this fact is sufficient in itself to sustain a verdict of guilty on the third count of the information, to-wit: nuisance.

Plaintiff in error contends that the second count, alleging unlawful possession, is not supported by the evidence. We agree with counsel that the fact is undisputed that the liquor which was seized by the arresting officers was made by plaintiff in error in his own home. However, counsel's statement on page five of his brief, that "the presumption must be indulged, legally, for his 'own use and that of his *bona fide* guests" is not the law. Quoting from section 33 of article 2 of the National Prohibition Act,

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor, shall be *prima facie* evidence that such liquor is kept for the purpose of

being sold, etc., or otherwise disposed of, in violation of the provisions of this title.”

We contend that the testimony of the plaintiff in error [Tr. pp. 25 and 26] to the effect that he manufactured this wine in September, 1920, which manufacture was unlawful, certainly brings it within the purview of that part of section 33 above quoted.

In support of the contention of defendant in error that the evidence was sufficient to maintain a verdict of guilty and a sentence on the third count of the information we respectfully refer to the case of *Strada* against the United States, 281 Federal, and *Lewinsohn v. United States* (C. C. A.) 278 Federal, 421-425, “the continuity of wrong doing implied in the charge of maintaining a nuisance may sufficiently appear from the nature and circumstances of a single transaction” in addition to the above we also contend that the case at bar is similar to the *Strada* case in that evidence was properly admitted and received to show at least one prior sale.

In addition we contend that the illegal manufacture of this wine by plaintiff in error in his own home [according to his own testimony, Tr. pp. 25 and 26] takes from his own home the character of a private dwelling, and makes it in part at least, a place of business, or some place other than the place which is used as his dwelling only.

The contention of the plaintiff in error that the provisions of the National Prohibition Act which declares the act of possession a crime is illegal and unconstitu-

tional and therefore void, we respectfully contend is erroneous.

Page *et al.* v. United States, 278 Fed. 41.

United States v. Dowling, 278 Federal 630, quoted at length by counsel for plaintiff in error, has no application to the case at bar for the reason that in this case facts are alleged and proven which accompany the mere fact of unlawful possession, to-wit: sales and manufacture, and the only portion of the quoted opinion which has any application here is, "the possession is unlawful unless it be coupled with illegal 'manufacture' or 'sale' or 'transportation' or 'importation' or 'exportation' ". (Brief of plaintiff in error, p. 10, l. 17.)

Summing up, therefore, defendant in error respectfully contends that the evidence was first, sufficient to support the verdict and sentence on the first count in that the sale as alleged was sufficiently proven; second, the evidence was sufficeint to support the verdict and sentence on the second count in that it was proven that liquor was unlawfully manufactured at the home of plaintiff in error, and more than one sale by the defendant was proven; and third, that the evidence of sales and manufacture was amply sufficient to support the verdict and sentence on the third count, i. e., that of maintaining a nuisance.

We submit that the judgment of conviction should be sustained.

JOSEPH C. BURKE,
United States Attorney,
MACK MEADER,
Assistant U. S. Attorney,
Attorneys for Defendant in Error.

United States 13
Circuit Court of Appeals
For the Ninth Circuit.

WILLAMETTE NAVIGATION COMPANY, a
Corporation,

Appellant,

VS.

HARTFORD FIRE INSURANCE COMPANY,
a Corporation,

Appellee.

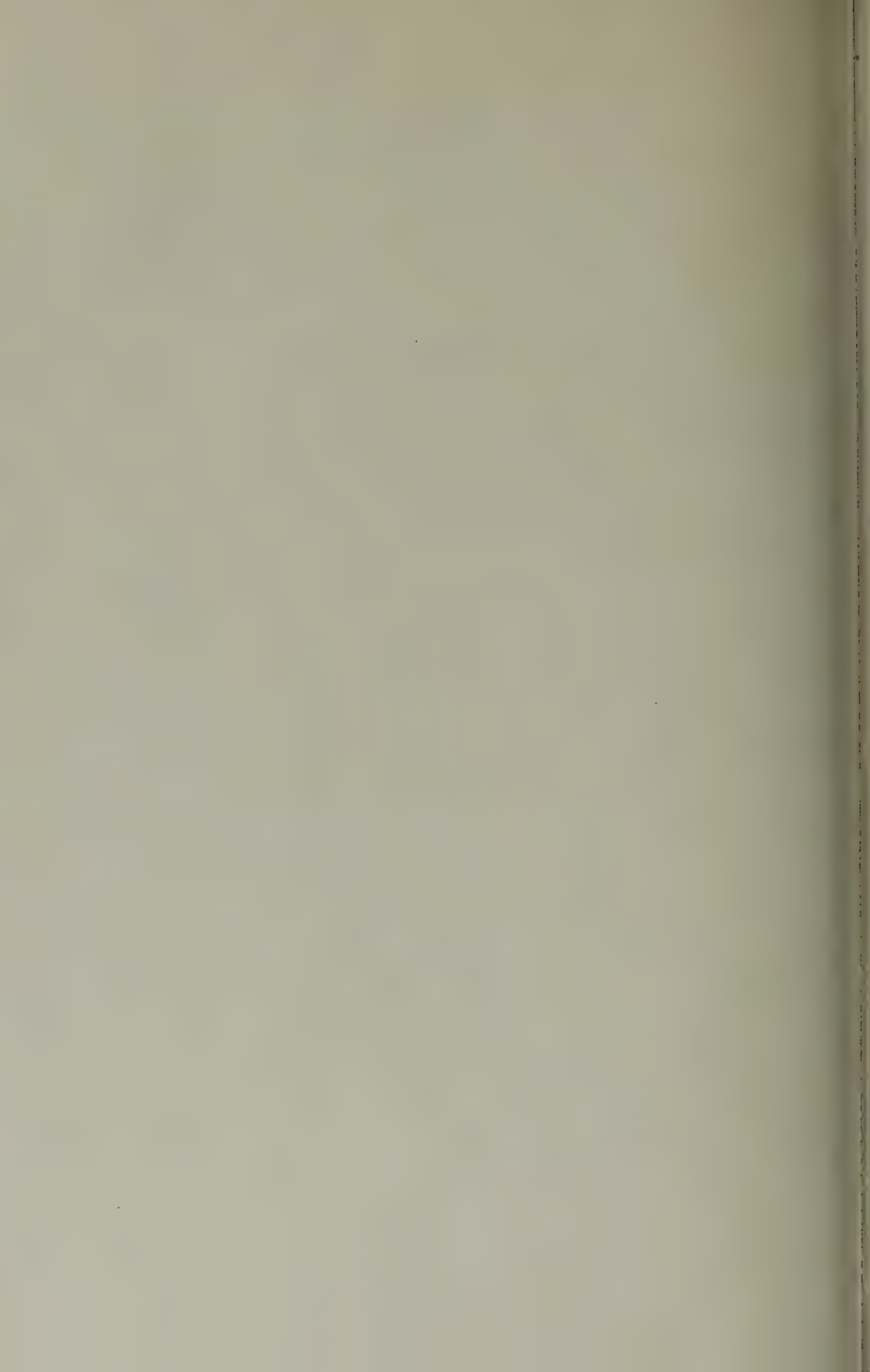
Apostles on Appeal.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.

FILED

SEP 11 1922

F. D. MONCKTON.
CLERK.



United States
Circuit Court of Appeals
For the Ninth Circuit.

WILLAMETTE NAVIGATION COMPANY, a
Corporation,

Appellant,

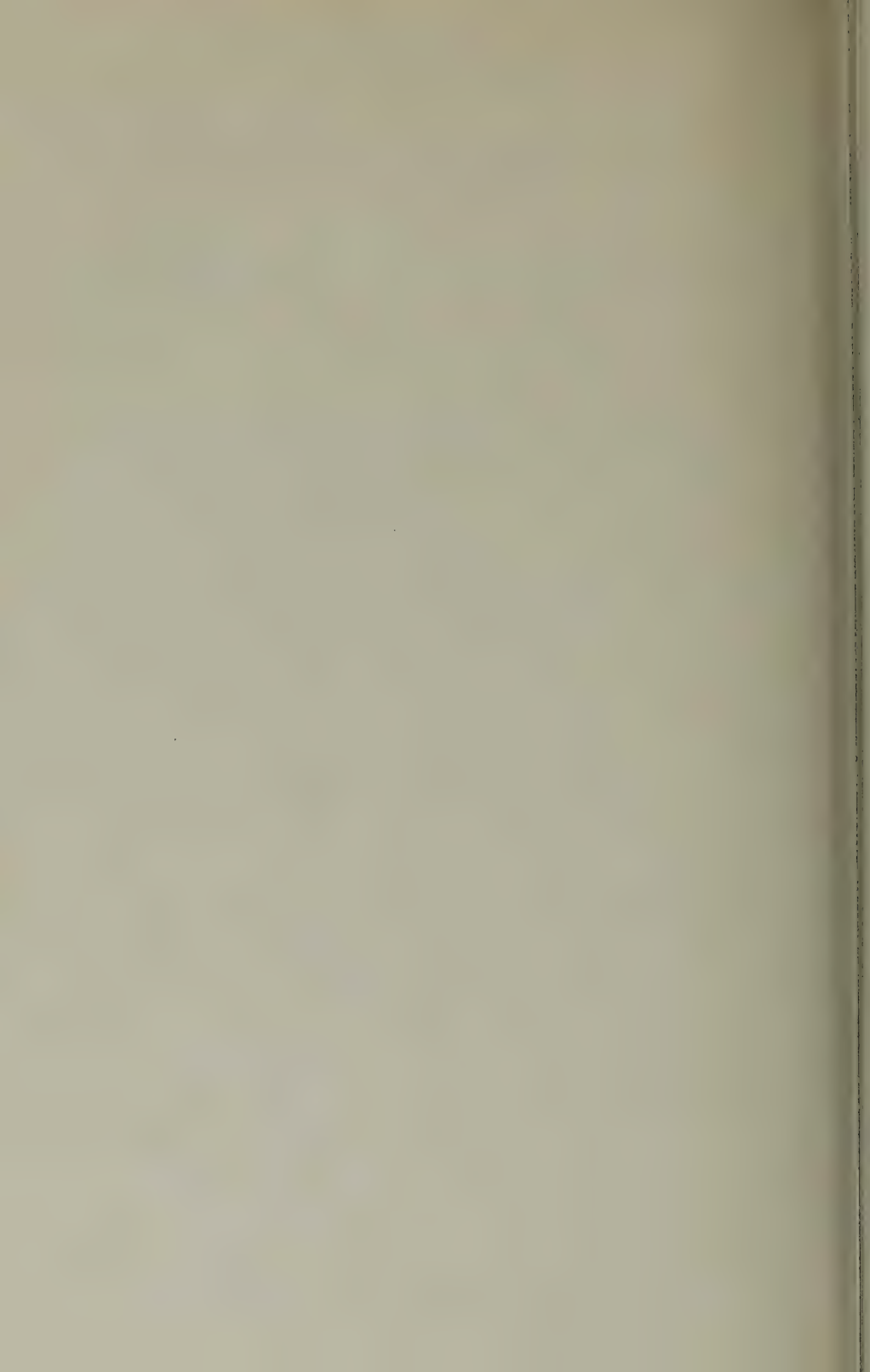
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a Corporation,

Appellee.

Apostles on Appeal.

Upon Appeal from the Southern Division of the
United States District Court for the
Northern District of California,
First Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Amended Answer to Interrogatories Propounded by Respondent.....	38
Answer to Interrogatories Propounded by Respondent.....	25
Answer to Libel.....	25
Assignment of Errors.....	202
Certificate of Clerk U. S. District Court to Appostles on Appeal.....	206
DEPOSITION ON BEHALF OF LIBEL- ANT:	
HEGDALE, OLAF.....	40
Cross-examination	45
Redirect Examination.....	63
Recross-examination.....	65
Redirect Examination.....	68
Recross-examination.....	68
Redirect Examination.....	71
Recross-examination.....	72
Exceptions to Libelant's Answers to Respondent's Interrogatories.....	37
Exceptions to Second Amended Libel.....	22

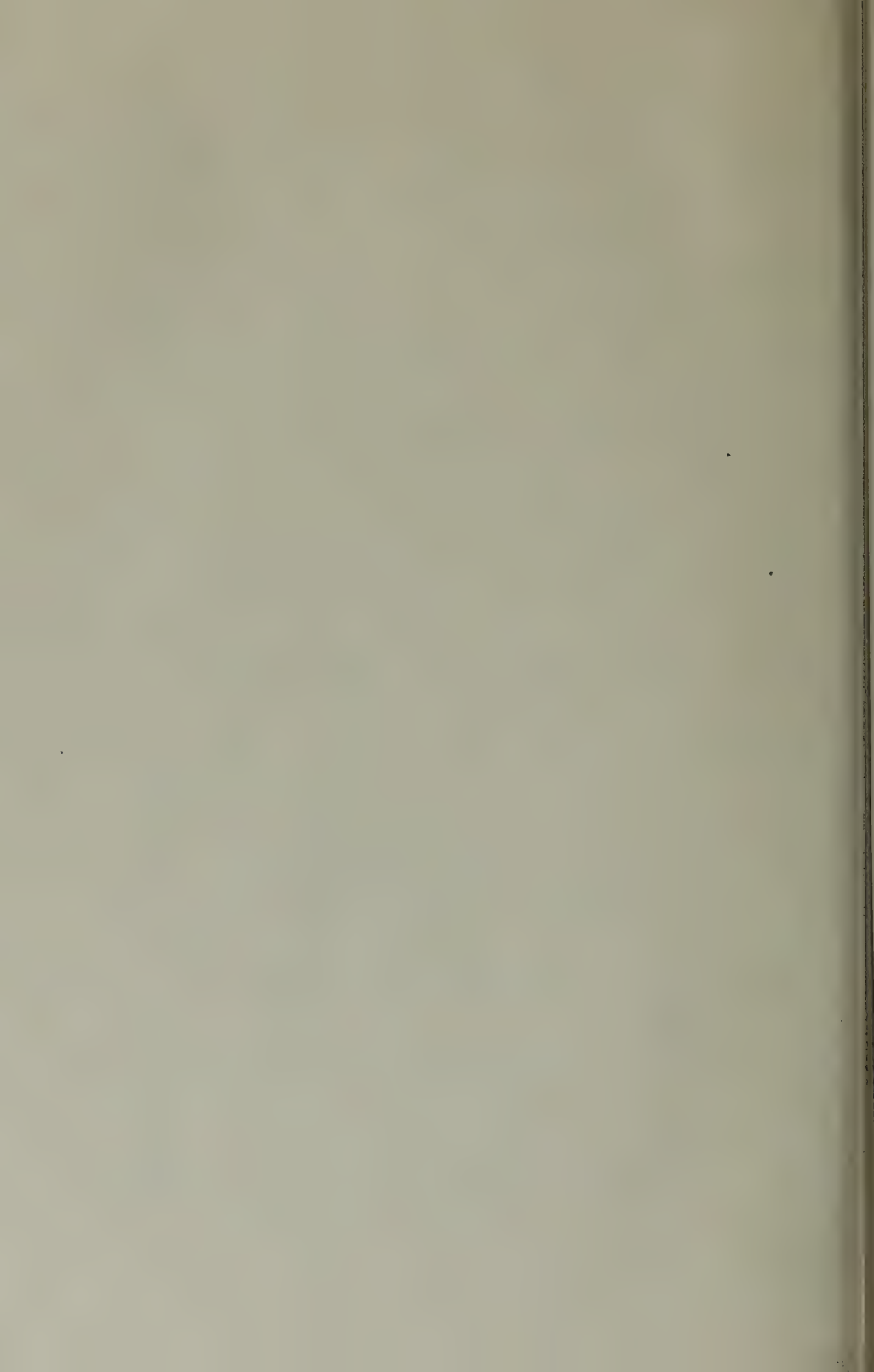
	Index.	Page
EXHIBITS:		
Exhibit "A" Attached to Libel—Policy of Insurance Issued to Willamette Navigation Company.....		9
Libelant's Exhibit No. 1—Letter Dated June 13, 1913, Ira S. Lillick to Adam Gilliland.....		87
Libelant's Exhibit No. 2—Letter Dated June 17, 1913, Adam Gilliland to Ira S. Lillick.....		95
Libelant's Exhibit No. 3—Proof of Loss on Certain Property Owned by Crown-Columbia Paper Company.....		101
Libelant's Exhibit No. 4—Letter Dated September 17, 1913, Ira S. Lillick to Hartford Fire Insurance Company..		120
Libelant's Exhibit No. 5—Bill of Lading..		126
Libelant's Exhibit No. 8—Letter Dated February 24, 1913, Willamette Navigation Company to Henry Hewitt & Co.		137
Libelant's Exhibit No. 9—Letter Dated February 28, 1913, Henry Hewett & Company to Willamette Navigation Company		138
Libelant's Exhibit No. 10—Letter Dated April 29, 1913, E. K. Stanton to Wm. Pierce Johnson.....		140
Libelant's Exhibit No. 11—Letter Dated May 1, 1913, Willamette Navigation Company to Henry Hewitt & Company		143

EXHIBITS—Continued:

Libelant's Exhibit No. 12—Letter Dated May 16, 1913, Henry Hewitt & Com- pany to Willamette Navigation Com- pany	144
Libelant's Exhibit No. 13—Letter Dated May 17, 1913, Willamette Navigation Company to Henry Hewitt & Company	145
Libelant's Exhibit No. 14—Letter Dated May 22, 1913, Henry Hewett & Com- pany to Willamette Navigation Com- pany	146
Libelant's Exhibit No. 15—Letter Dated May 26, 1913, Willamette Navigation Company to Henry Hewitt & Com- pany	147
Libelant's Exhibit No. 16—Letter Dated March 11, 1913, Henry Hewett & Com- pany to Willamette Navigation Com- pany	151
Libelant's Exhibit No. 17—Affidavit of W. B. Honeyman, Dated May 25, 1913	153
Libelant's Exhibit No. 18—Letter Dated January 21, 1913, Wm. B. Honeyman to C. S. Timberlake.....	155
Libelant's Exhibit No. 19—Proof of Loss.	159
Libelant's Exhibit No. 20—Statement of Loss—Steamer "Ruth".....	172
Libelant's Exhibit No. 21—Letter Dated February 28, 1913, Willamette Pulp	

	Index.	Page
EXHIBITS—Continued:		
& Paper Company to Standard Marine Insurance Company.....		175
Libelant's Exhibit No. 22—Letter Dated March 20, 1913, C. S. Timberlake to Adam Gilliland.....		189
Respondent's Exhibit "A"—Receipt Dated April 24, 1913, Signed by Willamette Navigation Company.....		98
Respondent's Exhibit "B"—Letter Dated March 3, 1913, Willamette Navigation Company to Henry Hewitt & Company		148
Respondent's Exhibit "C"—Letter Dated June 2, 1913, Henry Hewett & Company to Willamette Navigation Company		149
Respondent's Exhibit "D"—Unsigned Letter Dated June 3, 1913 to Henry Hewett & Company.....		151
Respondent's Exhibit "E"—Letter Dated January 22, 1913, Henry Hewett & Company to C. S. Timberlake.....		157
Final Decree.....		199
Interrogatories Propounded to Libelant.....		32
Libel		6
Notice of Appeal.....		201
Opinion and Order to Enter Decree in Favor of Respondent.....		198

	Index.	Page
Order Overruling Exceptions to Second Amended Libel.....		25
Praeipie for Apostles on Appeal.....		1
Second Amended Libel.....		18
Statement of Clerk U. S. District Court.....		3
Stipulation and Order Concerning Original Exhibits		205
Stipulation and Order Extending Time to and Including July 15, 1922, to File Apostles on Appeal.....		208
Stipulation and Order Extending Time to and Including August 15, 1922, to File Apostles on Appeal.....		209
TESTIMONY ON BEHALF OF LIBEL- LANT:		
GILLILAND, ADAM.....		85
Recalled		119
Recalled		152
PINKHAM, HARRY (In Rebuttal)....		196
Cross-examination.....		197
WHITNEY, CHARLES M.....		136
TESTIMONY ON BEHALF OF RESPOND- ENT:		
GILLILAND, ADAM (Recalled).....		165
Cross-examination.....		185
SUTRO, OSCAR.....		97
Cross-examination		99
Redirect Examination.....		117



In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Cor-
poration,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Cor-
poration,

Respondent.

Praeipice for Apostles on Appeal.

To the Clerk of the Above-entitled Court:

Please prepare transcript of record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit upon the appeal heretofore perfected in this court, and including in said transcript the following pleadings, proceedings and papers on file, to wit:

1. All those papers required by Section 1 of Paragraph 1 of Rule 4 of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit.

2. All the pleadings in said cause and all the exhibits annexed thereto.

3. All the testimony and other proofs adduced in the case, including the testimony taken at the trial, all depositions taken by either party and admitted in evidence, and all exhibits introduced by either party, said exhibits to be sent up as original

2 *Willamette Navigation Company vs.*

exhibits for the opinion and decision of the Court. [1*]

4. The final decree and notice of appeal.

5. The assignment of errors.

Dated: May 15, 1922.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Due service and receipt of a copy of the within Praecipe is hereby admitted this 15th day of May, 1922.

COOGAN & O'CONNOR,
ANDROS & HENGSTLER,
Proctors for Respondent.

Filed May 25, 1922. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [2]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

No. 15,514.

WILLAMETTE NAVIGATION COMPANY,
a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE COMPANY,
a Corporation,

Respondent.

*Page-number appearing at foot of page of original certified Apostles on Appeal.

Statement of Clerk U. S. District Court.

PARTIES.

Libelant: WILLAMETTE NAVIGATION COMPANY, a Corporation.

Respondent: HARTFORD FIRE INSURANCE COMPANY, a Corporation.

PROCTORS.

For Libelant and Appellant: IRA S. LILLICK, Esq., San Francisco, California.

For Respondent and Appellee: ANDROS & HENGSTLER; GOLDEN W. BELL, Esq., and COOGAN & O'CONNOR. [3]

PROCEEDINGS.

1914.

January 5. Filed libel for \$5621.85, on marine insurance policy.

13. Issued citation for appearance of respondent, which was returned with the following affidavit of service attached thereto:

“J. A. Olson, being duly sworn, deposes and says; that he is, and was at the time of the service of the citation herein referred to, a citizen of the United States, over the age of eighteen years and not a party to the within-entitled action; that he personally served the within citation on the hereinafter named defendant, whom deponent knew to be the general agent of the defendant named in said cita-

tion, by delivering to and leaving with Dixwell Hewitt, the general agent of said defendant, personally, on the 13th day of January, 1914, at the City and County of San Francisco, in the State of California.

J. A. OLSON.

Subscribed and sworn to before me this 24th day of January, 1914.

LEORA HAIL, (Seal)

Notary Public, in and for the City and County of San Francisco, State of California."

- | | | |
|-----------|----|--|
| May | 1. | Filed exceptions to libel. |
| September | 5. | Hearing exceptions to libel, argued and submitted. (Hon. M. T. Dooling, Judge). Ordered exceptions to libel sustained; libellant granted one week to file amended libel. |

1915.

- | | | |
|----------|-----|---|
| January | 12. | Filed amended libel. |
| April | 29. | Filed exceptions to amended libel. |
| June | 16. | Filed second amended libel. |
| December | 29. | Filed exceptions to second amended libel. [4] |

1916.

- | | | |
|---------|-----|--|
| January | 15. | Hearing exceptions to second amended libel. Hon. M. T. Dooling, Judge. Argued and submitted. |
|---------|-----|--|

27. Filed order overruling exceptions to second amended libel.

October 13. Filed answer to libel, with interrogatories propounded to libelant.

1919.

September 26. Filed libelant's answers to interrogatories propounded by respondent.

30. Filed exceptions to libelant's answers to interrogatories propounded by respondent.

November 22. Ordered exceptions to libelant's answers to interrogatories sustained.

December 11. Filed libelant's amended answers to interrogatories propounded by respondent.

1921.

March 23. Filed deposition of O. Hegdale, a witness on behalf of libelant.

June 23. This cause this day came on for hearing; Hon. M. T. Dooling, Judge; and after hearing was ordered submitted.

27. Filed exhibit (copy of letter and telegram) with stipulation pertaining thereto attached.

August 2. Filed testimony taken in open court.

1922.

March 6. Filed opinion. Ordered decree entered in favor of respondent.

11. Filed final decree.

May 25. Filed notice of appeal.
 Filed cost bond on appeal (\$500.-
 00) with Fidelity & Deposit Co.
 of Maryland as surety.

June 15. Filed assignment of errors. [5]

In the Southern Division of the United States
District Court for the Northern District of
California, First Division.

IN ADMIRALTY.

WILLAMETTE NAVIGATION CO., a Cor-
poration,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Cor-
poration,

Respondent.

(Libel.)

To the Honorable Judges of the District Court of
the United States, in and for the Northern
District of California:

The libel of the above-named libelant against the
above-named respondent in a cause of contract of
insurance, civil and maritime, alleges:

I.

That at all of the times hereinafter mentioned the
libelant above named was, and still is, a corporation
duly formed, organized and existing under and by
virtue of the laws of the State of Oregon.

II.

That at all of the times hereinafter mentioned the respondent above named was, and still is, a corporation duly formed, organized and existing under and by virtue of the laws of the State of Connecticut, and doing business at San Francisco and elsewhere as an insurer against maritime losses.

[6]

III.

That on the 20th day of May, 1912, said respondent, for a consideration of Fifteen Hundred (\$1500) Dollars, paid by said libelant to it, issued and delivered to said libelant, loss, if any, payable to assured, its policy of insurance, whereby it insured said libelant to the amount of Twenty Thousand (20,000) Dollars on paper in rolls, and/or bundles, and/or packages while on board S. S. "Ruth" for a term commencing upon the 10th day of May, 1912, at noon to the 10th day of May, 1913, at noon. That by the terms of said policy of insurance, a copy of which is hereto attached, marked Exhibit "A," which is hereby specifically referred to and made a part hereof, it was agreed between the parties thereto that said paper thereby insured was to include salvage charges.

IV.

After said policy had attached and while the same was in force, certain paper in rolls, insured in said policy, was, by the perils insured against, damaged to the amount of Five Thousand One Hundred Fifty-three and 20/100 Dollars (\$5153.30), and certain other paper in rolls insured in said

policy was saved by said insured at an expense to it for salvage charges of the sum of Four Hundred Sixty-eight and 65/100 Dollars (\$468.65), which said last mentioned sum said insured paid for said salvage; that no part or portion of said sums have ever been paid.

V.

The libelant to whom the said policy was by its terms made payable in case of loss, has kept and performed all of the conditions in said policy named upon its part to be kept and performed, and made proofs of said loss and said salvage [7] charges, and requested the respondent to pay the same, but the respondent has refused and does still refuse to pay the same, or any part or portion thereof.

WHEREFORE, libelant prays that a monition, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against said respondent and that said respondent may be required to answer all and singular the matters aforesaid, and that this Honorable Court would be pleased to decree the payment to the libelant of said sums totalling Five Thousand Six Hundred Twenty-one and 85/100 Dollars (\$5621.85), with costs and interest, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

WILLAMETTE NAVIGATION CO.,

By F. G. WIGHT.

IRA S. LILLICK,

Proctor for Libelant.

United States of America,
Northern District of California,—ss.

Subscribed and sworn to before me this 5th day
of January, 1914.

[Seal]

C. W. CALBREATH,

Deputy Clerk, United States District Court, North-
ern District of California. [8]

Exhibit "A."

No. 304

CARGO

HARTFORD FIRE INSURANCE CO.

Hartford, Connecticut.

BY THIS POLICY OF INSURANCE.

Sum	In Consideration of Fifteen Hundred
Insured—	($\$1500.00$) DOLLARS, DOES INSURE
$\$20,000.$	
Rate—	Willamette Navigation Co., a Corpora-
$7\frac{1}{2}$ per cent.	tion, for account of themselves, loss, if
Premium—	any, payable to assured to the amount
$\$1500.$	of Twenty Thousand ($\$20,000.00$) Dollars
Particular	
average—	
5%.	

On paper in rolls and/or bundles, and/or pack-
ages and on merchandise and/or supplies.

While on board S. S. "Ruth" and/or "N. R.
Lang."

At and from Oregon City, Oregon, to ports and
places in the Willamette and/or Columbia Rivers
and tributaries, and from Portland, Oregon, and
ports and places in the Willamette and/or Columbia
Rivers and tributaries to Oregon City, Oregon,
direct or via ports and places. Warranted not to
use ports and places below Astoria or above Cas-

cade Locks on the Columbia River or above Pulp Siding on the Willamette River.

This policy also covers property while contained on Ainsworth Dock in the City of Portland, Oregon, for a period of twenty-four hours after discharge from vessel, free from average.

This Company under the terms and conditions of this policy is not liable in case of total, or partial loss, or both combined, of any one cargo while on board steamers "Ruth" and/or "N. R. Lang" going down the Willamette or Columbia Rivers for an amount in excess of \$8000 and going up the Willamette or Columbia Rivers in an amount in excess of \$2000.

Warranted free from particular average under five per cent (5%), but to include salvage and general average charges.

Attached to and forming part of Cargo Policy #304 issued through the Marine & Transportation Department of the Hartford Fire Insurance Company, Hartford, Connecticut, but not valid unless countersigned by HENRY HEWETT & COMPANY, Agents, Portland, Oregon. [9]

upon all kinds of lawful goods and merchandise (petroleum excepted) laden on board the good steamer called the "Ruth" and/or "N. R. Lang," between Oregon City, Ore., to Portland, Ore., and/or Pulp Siding to Oregon City, Ore., at and from May 10th, 1912, at noon, to May 10th, 1913, at noon when this policy shall cease and expire, unless sooner terminated or made void by the conditions hereinafter expressed, the property insured

being warranted in a place of safety at the commencement of the risk.

TOUCHING the adventures and perils which the said company is contented to bear and take upon itself, they are of the sea, rivers, canals, railroads, fires, jettisons, and all other perils or misfortunes that have or shall come to the hurt, detriment, or damage of the said property, or any part thereof, excepting all perils, losses, or misfortunes arising from the want of ordinary care and skill in loading and stowing the cargo of, or in navigating the said vessel, from theft, barratry, or robbery, or other legally excluded causes. And in case of loss or misfortune, it shall be lawful and necessary to and for the insured, or insurer, their agents, factors, servants, and assigns, to sue, labor, and travel for, in, and about the defence, safeguard, and recovery of the said goods and merchandise, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, without prejudice to the rights of either party; to the charges [10] whereof the said company will contribute in such proportion as the sum herein insured bears to the whole value of the property so insured.

IT IS WARRANTED by the insured, free from any claim for loss or damage arising from seizure,

detention, or the consequences of any hostile act of the United States government; or of the people of any seceding or revolting State of this Union; or from the acts of parties sympathizing with or acting for or with such States, or the inhabitants thereof; and also from any loss or damage from piracy or letter of marque, or of the acts of any government hostile to the United States.

IT IS WARRANTED by the insured free from damage or injury, from dampness, or frost, heating, sweating, steaming, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual water contact with the articles damaged, and to be free from liability for leakage, on molasses, or other liquids, or breakage of articles liable to break from their own nature, unless occasioned by the perils insured against.

IT IS UNDERSTOOD AND EXPRESSLY AGREED that this policy does not cover any damage from ice.

Specie, bullion, jewels, bank notes or bills of exchange, deeds, bonds, mortgages, accounts, and all other evidence of debt; plate, metals, paintings, powder, pianofortes, statuary, sculptures, and curiosities, are not deemed to be included in any insurance, unless specially mentioned in the policy and scheduled.

AND IN CASE OF LOSS, such loss to be paid thirty days after proof of loss, and proof of interest in said property, are furnished this company, provided always, and it is hereby further agreed, that if the said insured shall have made any other

insurance upon the property aforesaid, prior in date to this policy, then the said company shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the property hereby insured; and the said company shall return the premium upon so much of the sum by it insured as it shall be by such prior insurance exonerated from. And in case of any insurance upon the said property, subsequent in date to this policy, the said company shall nevertheless be answerable for the full extent of the sum by it subscribed hereto, without right to claim contribution from such subsequent insurers, and shall accordingly be entitled to retain the premium by it received, in the same manner as if no subsequent insurance had been made. And in case of loss or damage to property hereby insured, this company, its agent, or representative, at or nearest the first port of discharge, shall have prompt notice of same, and shall have every opportunity and facility for ascertaining the cause, extent, and amount of damage, by personal inspection, appraisal, or sale of the damaged property. It is also agreed that the property be warranted by the insured free from any charge, damage, or loss, which may arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

IT IS FURTHERMORE HEREBY EXPRESSLY PROVIDED that no suit or action against this company, for the recovery of any

claim for loss or damage upon, under, or by virtue of this policy, shall be sustained in any court of law or equity, unless such suit or action shall be commenced within the term of twenty-four months next after the loss or damage shall occur, and in case any suit or action shall be commenced after the expiration of twenty-four months next after such loss or damage has occurred, the lapse of time shall be taken and deemed as conclusive evidence and a conclusive defence against the validity of the claim thereby so attempted to be enforced, and the liability of this company for all losses during the continuance of this policy shall not in the aggregate exceed the sum hereby insured. [11]

IMMEDIATE NOTICE OF THE OCCURRENCE of all losses shall be given to this company by the insured; and within thirty days from the time the same may happen, the said insured shall deliver to said company as particular an account thereof as the nature of the case will admit, stating the causes, if known, the extent thereof, and the nature of the interest of insured in the property, also what other insurance or insurances (if any) there was on said property at the time of said loss, which statement shall be in writing, signed by the insured, and verified by his or their oath; and so much of said statement as relates to the cause, nature, and extent of said loss or damage shall be verified also by the oath of the master of said boat or vessel, or of some other person or persons having immediate charge thereof at the time the same did happen, otherwise this com-

pany will not be liable under this policy; and the amount of loss shall be ascertained by the opening of packages, when necessary, by a competent person, and separating the sound from the damaged portion, this company being liable for the loss on the damaged portion only, which shall be ascertained by appraisement by disinterested persons, or by sale at auction as this company may prefer.

THE SAID LOSS OR DAMAGE to be estimated according to the true and actual cash value of the said property at the place of destination on the day of the disaster; and on the property not forwarded to its destination, the said loss or damage to be ascertained in the same manner, and the freight from the place of disaster to the place of destination deducted, and this company will be liable for such proportion of the whole loss as the amount hereby insured bears to the sound value of property so insured. ~~In all cases of loss or damage there shall be deducted, in lieu of average, the sum of \$200. Dollars.~~

IN CASE OF LOSS, all unpaid premiums shall be deducted.

IT IS ALSO UNDERSTOOD AND AGREED that, in case of loss or damage under this policy, the insured, in accepting payment therefor, hereby and by that act assigns and transfers to this company all his or their right to claim for loss or damage, as against the CARRIER, OR OTHER PERSON OR PERSONS, to inure to its benefit, however, to the extent only of the amount of the

loss or damage and attendant expenses of recovery, paid or incurred by the said company; and any act of the insured, waiving or transferring, or tending to defeat or decrease, any such claim against the carrier, or such other person or persons, whether before or after the insurance was made under the policy, shall be a cancellation of the liability of this company, for or on account of the risk insured for which loss is claimed.

AND IT IS UNDERSTOOD AND AGREED that this company or its agent shall have free access at all reasonable hours to the books, accounts, instructions, and correspondence of the insured, containing statements of, or which relate to, shipments and receipts covered by this policy.

This policy shall be canceled at any time at the request of the insured or by the company by giving fifteen days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, this company retaining the customary short rate, except that when this policy is canceled at the instance of this company it shall retain only the pro rata premium.

THE ASSURED AGREES that any broker, person, firm, or corporation, other than an agent of this company duly commissioned in writing under its corporate seal, who shall have procured [12] this insurance to be taken by this company, shall be deemed to be exclusively the agent of the assured in any and all transactions and representa-

tions relating to this insurance, and that any brokerage on or rebate from the premium or consideration named herein that may be paid or allowed to such broker, person, firm, or corporation, is to be considered as paid or allowed to the assured.

N. B.—This policy is subject to the usages and regulations of the Port of New York on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided for, to be stated by a competent adjustment of marine losses, designated by the insurers.

IN WITNESS WHEREOF, this company has executed and attested these presents, this 20th day of May, 1912. This policy shall not be valid until countersigned by the duly authorized manager or agent of the company at Portland, Ore.

FRED'K SAMSON,
Secretary.

CHAS. E. CHASE,
President.

Countersigned by HENRY HEWETT & CO.
Agents.

[Endorsed]: Filed Jan. 5, 1914. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the District Court of the United States, for the
Northern District of California, First Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

(Second Amended Libel.)

To the Honorable Judges of the District Court of
the United States, in and for the Northern District
of California:

The second amended libel of the above-named
libelant against the above-named respondent, in a
cause of contract of insurance, civil and maritime,
alleges:

I.

That at all of the times hereinafter mentioned
the libelant above named was, and still is, a corporation
duly formed, organized and existing under and by virtue
of the laws of the State of Oregon.

II.

That libelant is informed and believes, and upon
such information and belief alleges, that at all of
the times hereinafter mentioned the respondent
above named was, and still is, a corporation duly
formed, organized and existing under and by virtue

of the laws of the State of Connecticut, and doing business at San Francisco, and elsewhere, as an insurer against maritime losses. [14]

III.

That on the 20th day of May, 1912, said respondent, for a consideration of Fifteen Hundred (1500) Dollars, paid by said libelant to it, issued and delivered to said libelant, loss, if any, payable to assured, its policy of insurance, whereby it insured said libelant to the amount of Twenty Thousand (20,000) Dollars on paper in rolls, and/or bundles, and/or packages, while on board S. S. "Ruth," for a term commencing upon the 10th day of May, 1912, at noon to the 10th day of May, 1913 at noon; that by the terms of said policy of insurance, a copy of which is hereto attached, marked Exhibit "A," which is hereby specifically referred to and made a part hereof, it was agreed between the parties thereto that said paper thereby insured was to include salvage charges.

IV.

That on or about, to wit, the 11th day of January, 1913, certain paper, in rolls, was placed in the custody and care of the libelant herein, at the Port of Oregon City, Oregon, and libelant agreed to deliver the same by the S. S. "Ruth" in good order and condition at the Port of Portland, Oregon.

V.

That after said policy had attached, on or about, to wit, the 11th day of January, 1913, the said S. S. "Ruth," with said paper in rolls on board, set sail upon a voyage from said Port of Oregon

City, Oregon, to said Port of Portland, and during the course thereof, and while said paper in rolls was on board said S. S. "Ruth" and said policy was still in force, the said steamer stranded and sunk in the Willamette River, near the Port of Gladstone, Oregon; that by reason of said stranding and sinking a part of said paper in rolls insured in said policy was damaged to the amount of Five Thousand One Hundred Fifty-three [15] and 20/100 Dollars (\$5153.20), and certain other of said paper in rolls insured in said policy was saved out of said disaster by said insured at an expense to it for salvage charges of the sum of Four Hundred Sixty-eight and 65/100 Dollars (\$468.65), which said last mentioned sum said insured paid for said salvage; that no part, or portion, of said sums has been paid.

VI.

That the libelant, to whom the said policy was by its terms made payable in case of loss, has kept and performed all of the conditions of said policy named upon its part to be kept and performed, and made proofs of said loss and said salvage charges, and requested the respondent to pay the same, but the respondent has not paid, and refuses to pay, the same, or any part or portion thereof.

WHEREFORE, the libelant prays that a monition, according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, may issue against said respondent and that said respondent may be required to answer all and singular the matters aforesaid, and that

this Honorable Court would be pleased to decree the payment to the libelant of said sums, totalling Five Thousand Six Hundred Twenty-one and 85/100 Dollars (\$5621.85), with costs and interest, and that the libelant may have such other and further relief as in law and justice it may be entitled to receive.

WILLAMETTE NAVIGATION CO.

By F. G. WIGHT.

IRA S. LILLICK,

Proctor for Libelant. [16]

State and Northern District of California,
City and County of San Francisco,—ss.

F. G. Wight, being first duly sworn, deposes and says, that he is an officer of the Willamette Navigation Co., a corporation, to wit, the agent thereof; that as such he has authority to execute this verification; that he has read the foregoing second amended libel and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and, as to those matters, he believes it to be true.

F. G. WIGHT.

Subscribed and sworn to before me this 14th day of June, A. D. 1915.

[Seal]

M. V. COLLINS,

Notary Public, in and for the City and County of
San Francisco, State of California.

It is hereby stipulated and agreed that libelant may file the within and foregoing second amended

libel, and it is further stipulated that the copy of the insurance policy attached to the first amended libel may be deemed to be attached hereto.

IRA S. LILLICK,

Proctor for Libellant.

ANDROS & HENGSTLER,

COOGAN & O'CONNOR,

Proctor for Respondent.

[Endorsed]: Filed Jun. 16, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [17]

In the District Court of the United States, in and
for the Northern District of California, First
Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corpora-
tion,

Libellant,

vs.

HARTFORD FIRE INSURANCE CO., a Corpora-
tion,

Defendant.

Exceptions to Second Amended Libel.

To the Honorable MAURICE T. DOOLING, Judge
of said Court:

The exceptions of respondent to the second
amended libel in the above-named cause allege:

I.

That said second amended libel does not state

facts sufficient to constitute a cause of action in this: that it does not appear therein that libelant had any insurable or other interest in said goods at the inception of the risk or risks insured against.

II.

That said second amended libel does not state facts sufficient to constitute a cause of action in this, to wit: that it does not appear therein that libelant had any insurable or other interest in said goods at the time of the alleged loss.

III.

That said second amended libel is uncertain in this, to wit: that it cannot be ascertained therefrom what, if any, insurable or other interest libelant had in said goods at the inception [18] of the risk or risks insured against; and it cannot be ascertained therefrom what, if any, insurable or other interest libelant had in said goods at the time of the alleged loss.

IV.

That said second amended libel does not state facts sufficient to constitute a cause of action in this, to wit: that it does not appear therein that libelant was in any way damaged by the alleged loss of said goods.

V.

Said second amended libel is uncertain in this, to wit: That it cannot be ascertained therefrom what, if any, damage said libelant sustained by reason of the alleged loss of said goods, nor can it be ascertained therefrom how said libelant was

in any way damaged by such alleged loss of said goods.

WHEREFORE, respondent prays that said Second Amended Libel be dismissed with costs.

ANDROS & HENGSTLER,
GOLDEN W. BELL,

Proctors for Respondent.

[Endorsed]: Due service and receipt of a copy of the within is hereby admitted this 27 day of Dec. 1915.

IRA S. LILLICK,
J. A. O.

Filed Dec. 29, 1915. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [19]

In the District Court of the United States, in and
for the Northern District of California, First
Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corpora-
tion,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corpora-
tion,

Respondent.

IRA S. LILLICK, Esq., Proctor for Libelant.
ANDROS & HENGSTLER and G. W. BELL, Esq.,
Proctors for Respondent.

(Order Overruling Exceptions to Second Amended Libel.)

The exceptions to the second amended libel are overruled and respondent allowed ten days in which to answer.

January 27th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jan. 27, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [20]

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

Answer to Libel.

To the Honorable M. T. DOOLING, Judge of the District Court of the United States, for the Northern District of California:

Now comes the respondent herein, and answering the amended libel of the libelant, admits, denies and alleges as follows, to wit:

I.

Alleges that it has not sufficient information or belief either to admit or deny the allegations contained in Article I of said amended libel, and therefore it demands proof thereof.

II.

Admits the allegations contained in Article II of said amended libel.

III.

Admits that on or about the 20th day of May, 1912, respondent, for a consideration of Fifteen Hundred Dollars (\$1500), paid by libelant to it, insured and delivered to libelant a policy of insurance, numbered 304, to wit, the original of which Exhibit "A" attached to said amended libel purports to be a copy, whereby respondent insured libelant to the amount of Twenty Thousand Dollars (\$20,000) on paper in rolls and/or bundles and/or packages, while on board the S. S. "Ruth," for the term, between the places and [21] subject to all of the terms of conditions set forth in said original policy numbered 304, and not otherwise.

IV.

Denies that no part or portion of the sums mentioned in Article IV of said amended libel has ever been paid by respondent, but admits that respondent has not paid the whole thereof; and as to whether the whole or any part thereof has been paid to libelant by other parties, respondent is ignorant, and calls for proof thereof; as to the other allegations contained in Article IV of said amended libel, alleges that it has not information or knowl-

edge sufficient either to admit or deny the same, and therefore respondent calls for full and strict proof of each and every one of such allegations.

V.

Denies that libelant has kept and performed or kept or performed all of the conditions in said policy named upon its part to be kept and performed or kept or performed; denies that libelant made proofs of said alleged loss and said alleged salvage charges or said alleged salvage charges, as required by the terms and conditions of said policy of insurance; admits that libelant requested respondent to pay the alleged loss and salvage charges, and that respondent has refused and continues to refuse to pay the whole thereof, but denies that respondent refused to pay any part thereof, and in this behalf respondent alleges that on or about the 24th day of April, 1913, it paid to libelant the sum of Eleven Hundred Fifty-eight Dollars and Eighty Cents (\$1158.80) in full satisfaction and compromise of all claims and demands against respondent for loss or damage by the stranding of the steamer "Ruth," which occurred on the 11th day of January, 1913, to the property described in said policy numbered 304, which stranding is that referred to in Article IV of the amended libel, and that therefore, and in consideration thereof, libelant executed and delivered to respondent a voucher and satisfaction in full, in the following words and figures, to wit:

[22]

“Marine and Transportation Department,
The Hartford Fire Insurance Company,
Hartford, Conn.

April 24th, 1913.

Received of The Hartford Fire Insurance Company, through Palache & Hewitt, Genl. Agents at San Francisco, the sum of eleven hundred fifty-eight & 80/100 dollars, being in full satisfaction and compromise settlement of all claims and demands against the said Company for loss or damage by stranding Str. Ruth, which occurred on the 11th day of January, 1913, to the property described under cargo policy No. 304 of said company

\$1158.80:

WILLAMETTE NAVIGATION COMPANY,

By OSCAR SUTRO.”

For a further and separate affirmative defense respondent alleges that on or about the 24th day of April, 1913, it paid to libelant the sum of Eleven Hundred Fifty-eight Dollars and Eighty Cents (\$1158.80) in full accord and satisfaction and compromise of all claims and demands whatsoever against respondent for loss or damage by the stranding of the steamer “Ruth,” referred to in Article IV of the amended libel, to the property described in said policy numbered 304, and said libelant accepted said sum of Eleven Hundred Fifty-eight Dollars and Eighty Cents (\$1158.80) in full accord and satisfaction and compromise of all claims and demands against respondent for said loss and damage under said policy numbered 304, and executed

and delivered to respondent a receipt, satisfaction and release in the words and figures above set forth. [23]

For a further second and separate affirmative defense respondent alleges:

That libelant is a common carrier of property and merchandise, and its sole interest in the merchandise and property referred to in the amended libel herein was and is that of a common carrier of such property for hire; that libelant received said property from divers shippers for the purpose of carrying the same on said steamer "Ruth" for hire, and that libelant received said property under and agreed to carry the same by virtue of certain bills of lading issued by libelant to said divers shippers, and subject to the terms and conditions of said bills of lading, and not otherwise; that the sole interest of libelant in said property was and is as a common carrier under said bills of lading.

That said bills of lading contained, among others, the following condition agreed to by libelant and said divers shippers:

"If all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from perils of the lakes, sea or other

waters; or from explosion, bursting of boilers, breaking of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage."

That the loss and damage referred to in the amended libel herein occurred by a peril of the river, stranding of said steamer [24] "Ruth," and that libelant was and is not in any wise responsible or liable therefor, by virtue of said above conditions and the limitations and exemptions by statute, therein referred to and particularly by virtue of the Harter Act; that libelant suffered and sustained no loss by virtue of the damage to or loss of said property, and will not hereafter sustain any loss thereby; that libelant had no insurable interest in said property as against the contingency aforesaid.

For a further third and separate affirmative defense respondent alleges:

That it is provided in the policy of insurance referred to in said amended libel, among other things, that "if the said insured shall have made any other insurance upon the property aforesaid, prior to the date of this policy, then the said company shall be answerable only for so much as the amount of such prior insurance may be deficient toward fully covering the property hereby insured"; that, according to the information and belief of respondent, said libelant had made other insurance upon the property aforesaid, prior to the date of said policy in the amended libel referred to, and said prior in-

insurance was not to any amount deficient toward fully covering the property insured by the policy referred to in the amended libel herein.

For a further fourth and separate affirmative defense respondent alleges:

That said steamer "Ruth" was unseaworthy when said property was placed on board of her and the insurance in said amended libel referred to never attached or became effective and said unseaworthiness was the proximate and efficient cause of the alleged damage and loss of said property. [25]

For a further fifth and separate defense respondent alleges:

That no proofs of the alleged loss of and damage to said property were presented or made within the time required and specified in said policy of insurance referred to in said amended libel.

For a further sixth and separate affirmative defense respondent alleges:

That the bills of lading under and by virtue of which libelant received said property as a common carrier, contained, among others, the following provision:

"Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance."

That respondent is unable to state whether or not libelant has received the full benefit of any other

such insurance, and if so in what amount, and therefore respondent calls for full proofs in the premises, and prays that any such insurance received by libelant be offset against any claim upon respondent.

WHEREFORE respondent prays that the amended libel herein be dismissed with costs to respondent, and further that libelant be required to answer on oath the interrogatories hereunto annexed.

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Respondent. [26]

State of California,
City and County of San Francisco,—ss.

Adam Gilliland, being first duly sworn, deposes and says that he is an officer of the respondent herein, to wit, that Assistant Gen'l Agent thereof; that he has read the foregoing answer and knows the contents thereof and the same is true of his own knowledge, except as to those matters therein stated to be upon information and belief, and as to those he believes it to be true.

ADAM GILLILAND.

Subscribed and sworn to before me this 11th day of October, 1916.

[Seal]

JAMES MASON.
Notary Public. [27]

Interrogatories (Propounded to Libelant).

1. Was and is not the only interest which libelant ever had in the property referred to in the libel that of a common carrier for hire?

2. If libelant ever had or has any other interest in said property state fully the nature of such interest.

3. Was the libelant ever the owner of any of the property referred to in the libel?

4. Is it not true that all of the bills of lading, under which libelant received the property referred to in the libel from the shippers thereof, contained the provision set out in the second affirmative defense in the answer to the amended libel?

5. Is it not true that all of the bills of lading under which libelant received the property referred to in the libel from the shippers thereof, contained the provision set out in the sixth affirmative defense in the answer to the amended libel?

6. Is it not a fact that the libelant had a policy in another company fully covering the property referred to in the amended libel, dated January 25th, 1906?

7. Is it not a fact that libelant collected from another insurance company the full amount for which this action was filed?

8. What amount or amounts has libelant received from other insurance companies for any loss or damage to the property referred to in the libel?

9. Name such company or companies, state when each amount was received from it or them and what each of such amounts was.

10. Has libelant ever paid any amount or amounts to any [28] shipper or shippers of the property referred to in the amended libel herein by

reason of any loss or damage to such property, and if so what amounts and when?

11. Has libelant ever agreed to make any such payments, and if so what amounts and when?

12. Is it not a fact that the "Ruth" was beached in order to prevent her from sinking in deep water from leakage?

ANDROS & HENGSTLER,
GOLDEN W. BELL,
Proctors for Respondent.

[Endorsed]: Due service and receipt of a copy of the within answer is hereby admitted this 11th day of October, 1916.

IRA S. LILLICK,
——— for Libelant.

Filed Oct. 13, 1916. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [29]

In the District Court of the United States, in and
for the Northern District of California, First
Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corpora-
tion,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corpora-
tion,

Respondent.

Answer to Interrogatories Propounded by Respondent.

Now comes libelant, and, answering the interrogatories propounded by respondent, makes the following replies:

To Interrogatory No. 1: Yes, so far as libelant is at present advised.

To Interrogatory No. 2: None, so far as libelant is at present advised.

To Interrogatory No. 3: No.

To Interrogatory No. 4: Yes.

To Interrogatory No. 5: Yes.

To Interrogatory No. 6: No.

To Interrogatory No. 7: No.

To Interrogatory No. 8: None.

To Interrogatory No. 9: Answered by previous answer.

To Interrogatory No. 10: No.

To Interrogatory No. 11: No.

To Interrogatory No. 12: No. The libelant has been informed that the steamer "Ruth" struck the bottom, and was beached [30] to prevent her sinking in deep water.

WILLAMETTE NAVIGATION CO.,

By (Signed) F. G. WIGHT,

Agent.

Northern District of California,
City and County of San Francisco,—ss.

F. G. Wight, being first duly sworn, deposes and says, that he is an officer, to wit, the agent of the Willamette Navigation Co.; that as such officer

he has authority to execute this verification; that he has read the foregoing answers to the interrogatories propounded by respondent, and knows the contents thereof, and that the same are true of his own knowledge, except as to those matters therein stated on information, or belief, and that, as to those matters, he believes it to be true.

(Signed) F. G. WIGHT.

Subscribed and sworn to before me this 22d day of September, A. D. 1918.

[Seal] (Signed) H. L. LANFAR,
Notary Public in and for the City and County of
San Francisco, State of California.

[Endorsed]: Receipt of a copy of the within is hereby admitted this 24th day of Sept. 1919.

ANDROS & HENGSTLER,
Proctors for Respondent.

Filed Sep. 26, 1919. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [31]

In the District Court of the United States, for the
Northern District of California, First Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corpora-
tion,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corpora-
tion,

Respondent.

Exceptions to Libelant's Answers to Respondent's Interrogatories.

1. Said answers are insufficient in that it does not appear that they are the personal answers of the libelant as required by Rule 32 of the Admiralty Rules.

2. Said answers are insufficient in that it appears that they are not the personal answers of the libelant as required by Rule 32 of the Admiralty Rules.

ANDROS & HENGSTLER,
Proctors for Respondent.

[Endorsed]: Due service and receipt of a copy of the within Exceptions, etc., is hereby admitted this 29th day of Sept. 1919.

IRA S. LILLICK,
Proctor for Libelant.

Filed Sep. 30, 1919. W. B. Maling, Clerk.
By C. W. Calbreath, Deputy Clerk. [32]

In the District Court of the United States, in and
for the Northern District of California, First
Division.

IN ADMIRALTY—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corpora-
tion,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corpo-
ration,

Respondent.

(Amended) Answers to Interrogatories Propounded by Respondent.

Now comes libelant, and, answering the interrogatories propounded by respondent, makes the following replies:

To Interrogatory No. 1: Yes, so far as libelant is at present advised.

To Interrogatory No. 2: None, so far as libelant is at present advised.

To Interrogatory No. 3: No.

To Interrogatory No. 4: Yes.

To Interrogatory No. 5: Yes.

To Interrogatory No. 6: No.

To Interrogatory No. 7: No.

To Interrogatory No. 8: None.

To Interrogatory No. 9: Answered by previous answer.

To Interrogatory No. 10: No.

To Interrogatory No. 11: No.

To Interrogatory No. 12: No. The libelant has been [33] informed that the steamer "Ruth" struck the bottom, and was beached to prevent her sinking in deep water.

WILLAMETTE NAVIGATION CO.

By B. T. McVAIN,

Secretary.

County of Multnomah,
City of Portland,
State of Oregon,—ss.

B. T. McVain being first duly sworn, deposes and says: That he is an officer, to wit, the secre-

tary, of the Willamette Navigation Co.; that as such officer he has authority to execute this verification; that he has read the foregoing answers to the interrogatories propounded by respondent, and knows the contents thereof, and that the same are true of his own knowledge, except as to those matters therein stated on information or belief, and, that, as to those matters, he believes it to be true.

B. T. McVAIN.

Subscribed and sworn to before me this 4th day of December, A. D. 1919.

[Seal]

MARY J. SMYTH,

Notary Public, in and for the City of Portland,
County of Multnomah, State of Oregon.

My commission expires Feb. 16, 1921.

[Endorsed]: Due service and receipt of a copy of the within amended answers, etc. is hereby admitted this 10th day of December, 1919.

ANDROS & HENGSTLER.

By JOHN E. MANDERS,

Proctors for Respondent.

Filed Dec. 11, 1919. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [34]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 15,514—IN ADMIRALTY.

WILLAMETTE NAVIGATION COMPANY, a
Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

**Deposition of Olaf Hegdale, Taken in Behalf of
Libelant. [35]**

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 15,514.—IN ADMIRALTY.

WILLAMETTE NAVIGATION CO., a Corporation,

Libellant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

IT IS HEREBY STIPULATED and agreed by and between the parties herein that the deposition of Olaf F. Hegdale, a witness to be produced, sworn

and examined on behalf of libelant, may be taken before Alva W. Person, a notary public, on the 9th day of March, 1921, or on such subsequent date as may be agreed upon by counsel for said parties at Portland, Oregon, and said deposition may be taken upon interrogatories to be propounded to said witness orally before said Alva W. Person, or any notary public in said City of Portland, State of Oregon, at the offices of Messrs. Platt, Platt, Montgomery & Fales, Room No. 619 Platt Building, Portland, Oregon.

IT IS FURTHER STIPULATED that the deposition so taken under this stipulation, when written up, may be read in evidence by either of the parties to the above-entitled action on the trial of the case and that all objections as to the form of questions are waived, unless objected to at the time of taking said deposition and that all objections as to materiality and competency of the testimony are reserved to all parties. [36]

IT IS FURTHER STIPULATED that the reading over of the testimony to the witness and the signing thereof are hereby expressly waived.

Dated: San Francisco, California, January 26th, 1921.

IRA S. LILLYCK,
HUGH MONTGOMERY,
Attorney for Libelant,
ANDROS & HENGSTLER,
ERSKINE WOOD,
Attorneys for Respondent. [37]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

No. 15,514.—IN ADMIRALTY.

WILLAMETTE NAVIGATION COMPANY,
a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corpo-
ration,

Respondent.

DEPOSITION OF OLAF F. HEGDALE, FOR
LIBELANT.

Deposition of Olaf F. Hegdale, a witness produced on behalf of the libelant in the above-entitled cause, taken pursuant to stipulation hereto attached, duly signed by the proctors for the respective parties, before Alva W. Person, a notary public for Oregon, at the office of Messrs. Platt, Platt, Montgomery & Fales, Room 619 Platt Building, Portland Oregon, on the 9th day of March, 1921, beginning at the hour of eleven o'clock in the forenoon.

PRESENT:

Mr. HUGH MONTGOMERY, of Proctors for
the Libelant.

Mr. ERSKINE WOOD, of Proctors for the
Respondent.

(Deposition of Olaf F. Hegdale.)

Thereupon the witness, OLAF F. HEGDALE, was sworn to tell the truth, the whole truth and nothing but the truth, and was examined and testified as follows:

Direct Examination by Mr. MONTGOMERY.

Q. Now Captain, in what line of business are you at present [38] engaged?

A. Steamboating; master and pilot on river steamers.

Q. How long have you been engaged in that line of activity, Captain? A. As master and pilot?

Q. Yes. A. Approximately twenty years.

Q. In what locality, if any, or what localities?

A. I have steamboated on the Columbia and Willamette rivers.

Q. Between what ports?

A. Portland and Astoria, Portland and The Dalles, and Portland and Oregon City, and upper river points.

Q. Now, were you in the month of January, 1913, the master of the steamship "Ruth," which was then operating on the Willamette River?

A. I was.

Q. Between what ports was she operating at that particular time?

A. Oregon City and Portland.

Q. Were you the master of the steamship "Ruth" on the 11th day of January, 1913? A. I was.

Q. Between what ports was she operating on that particular date?

A. Oregon City and Portland.

(Deposition of Olaf F. Hegdale.)

Q. State the facts, if you can, as to the condition of the steamer "Ruth" on the 11th day of January, 1913, and immediately prior thereto, with reference to her seaworthiness.

A. The steamer on that date was in as good a condition as she was the day she was inspected and passed by the United States Inspectors. I inspected her at frequent intervals between that and the time of the stranding. I found no defects in [39] her. She was just as good, to my knowledge—to the best of my knowledge—on that day as she was when she was inspected.

Q. To what extent had you gone in making an inspection of the vessel on that date and immediately prior thereto? —

A. Well, immediately prior at regular intervals I would go through the hold and see if everything was all right, inspect all other parts of her, equipments, hull, cabins and everything, to see that they were in good condition.

Q. Now, do you recall the accident, or the occasion of the accident to the steamship "Ruth" on or about the 11th day of January, 1913, on the Willamette River at approximately the point where the Clackamas River meets the Willamette River?

A. Do I recall the incident?

Q. Yes. A. I do.

Q. Were you master of the vessel at that time?

A. I was.

Q. Now, based upon your experience in steamboating, and particularly your experience upon

(Deposition of Olaf F. Hegdale.)

the Willamette and Columbia rivers, state whether or not in your opinion the accident which occurred at that time was in any way traceable to any negligence upon the part of the steamship "Ruth," her crew or the master. A. It was not.

Mr. MONTGOMERY.—I think that is all.

Mr. WOOD.—That is a pure conclusion of law, I think. That is your lookout.

Mr. MONTGOMERY.—You may take the witness.

Cross-examination by Mr. WOOD.

Q. When did the U. S. Inspector last inspect her before the [40] stranding or the accident, whatever it was?

A. I do not remember the exact date of the inspection. She was regularly inspected yearly, regular yearly inspections, but I do not remember the date prior to the stranding.

Q. And their inspections are sometimes rather casual; they are not always absolute proof that the vessel is seaworthy, are they? You don't contend that?

A. I have found them quite to the contrary.

Q. Well, you know that many a vessel has been held in the courts to be unseaworthy after she has been inspected by the inspectors, don't you?

A. No, I do not.

Q. How often did you look over her?

A. How often?

Q. Yes.

A. Oh, sometimes every day and sometimes twice or three times a week I would go through her

(Deposition of Olaf F. Hegdale.)

thoroughly, and have a man go through her very frequently.

Q. Go inside her hull? A. Yes.

Q. Did you yourself go inside her hull?

A. Yes.

Q. How frequently did you do that?

A. Well, I don't know. Probably if everything went wrong, without any trouble and everything was all right, I might go through her one a week.

Q. You say if everything was wrong; you mean if everything was all right?

A. No; I mean if everything was all right, nothing wrong, I would go through her once a week and see that she was all right. [41]

Q. Did you go down through her hold then?

A. I would go through her hull frequently from one end to the other.

Q. With lights? A. I beg pardon?

Q. How did you get into the hull to inspect the inside?

A. We have a light for each department all through the hold. You can see it almost like day. And if you have occasion to go through her in the daytime you use flash-lights; you don't light the lights.

Q. You say that your opinion is that this accident was not due in any way to negligence; what do you base that opinion on?

A. On the perils of the sea.

Q. That is what you base your opinion on?

A. That—just a moment. I didn't get it.

(Deposition of Olaf F. Hegdale.)

Q. You were master of this ship at the time of this accident, weren't you? A. Yes.

Q. You were on her, weren't you? A. Yes.

Q. So to say that there was any negligence would be in effect to accuse yourself, wouldn't it?

A. The question wasn't negligence on my part or the crew or anything; I don't know just what they meant by that. Accusing myself?

Q. Well, I didn't know whether you did or not.

A. How did I answer that?

Q. You said that in your opinion that the accident was in no way due to negligence.

A. I do—I did. [42]

Q. Well, what do you base that opinion on? You gave it as an opinion.

A. Because we was doing all the ordinary, taking all the precautions, seeing that everything was as near right as could be.

Q. What do you mean by all the precautions?

A. Steering the river the same as I always done.

Q. Any other precautions?

A. Any other precautions?

Q. Did you take any other precautions?

A. What do you mean,—in preventing the accident?

Q. Yes.

A. When I found out that she was going to reach the beach most assuredly I done all I possibly could to stop her—stopped and backed full speed.

Q. Did she go toward the beach against your control? A. She did.

(Deposition of Olaf F. Hegdale.)

Q. What did she do? Did she take a shear toward the beach? A. Yes.

Q. What made her do that?

A. The condition of the stream; the swiftness of the current, I presume.

Q. You mean she took a sudden shear toward the beach? A. Yes, sir.

Q. Now what point was that in the river?

A. Just below the intersection of the Clackamas River.

Q. How far from the bank were you when you were navigating the usual channel there?

A. Approximately one hundred fifty feet, maybe two hundred at that point.

Q. What is the water like there? [43]

A. What is the water like?

Q. Yes.

A. I don't quite understand your meaning; what it is like in color?

Q. Still, slack, rapid?

A. Oh; very rapid; very swift at that time.

Q. Was that in the rapids that are just below the mouth of the Clackamas?

A. It was at the high-water channel opposite the rapids, what we call the rapids. There are two channels there; one we use in high water and the other one we use in low water. This was the high water channel. That channel is much straighter and easier to navigate ordinarily.

Q. Which shore do you mean you were one hundred and fifty feet from?

(Deposition of Olaf F. Hegdale.)

A. The east shore of the Willamette River.

Q. And was the vessel in the rapids when she took this sheer? A. She was in the swift current.

Q. Well, you know what is ordinarily understood by the word "rapids" in a river. Was she in rapids as commonly understood, breaking water?

A. Yes, sir. Well, breaking—now, if you will just stop just a minute and not take these notes I will explain to you here and then you will know better without taking the notes.

Mr. WOOD.—I think you had better explain and take the notes; it doesn't make any difference.

Mr. MONTGOMERY.—That is all right; just go ahead.

WITNESS.—Well, the rapids are right there in one sense, but there is no rapids at that stage of the water. The Willamette River was up quite high and there is a straight, or approximately [44] an even current, but it runs very swift all through. There is not the breaking or rolling rapids, but it is a steady running, very swift current, probably between six and eight miles an hour at that stage of water.

Q. Had you navigated the "Ruth" many times through that kind of water in that part of the river?

A. I navigated her about six years prior to that, five or six years, I think, every day, under all conditions.

Q. Did you ever have anything like a sudden sheer before? A. Oh, yes, I have.

(Deposition of Olaf F. Hegdale.)

Q. That put her in toward the shore?

A. Yes, sir.

Q. Did she go on the shore before?

A. No; I managed to stop her, until that time.

Q. Have you any explanation of the sheer at this time?

A. Any explanation for the cause of the sheer?

Q. Yes.

A. Well, only the swift current that the steamer was in, and going between the shore and an island, it was necessary to hold towards the shore to stay in the deep water, and the Clackamas River was very low, practically slack; the Willamette River was quite high; and the Columbia River was also very low, creating an unusually strong current, also current and slack water close to the east shore where she stranded. In order to keep her in the deepest water we had to steer a little to the east shore, and when the vessel was in the deepest water she was laying in the edge of an eddy formed on account of the slack water in the Clackamas. Thereby when we strived to get her back the current was too strong.

Q. When you started to get her to back? [45]

A. Started to come out.

Q. Oh, to swing her bow out?

A. Swing her bow out.

Q. Out in the main river again?

A. In the main river again.

Q. Yes.

A. The current was so swift she would not answer

(Deposition of Olaf F. Hegdale.)

fast enough to make it. She just sheered into the shore. The channel is deep right up through to the shore. You can land it anywhere right at the shore on that side where she hit. In fact, the vessel when she stranded, her stern lay in twenty feet of water and her bow was entirely up on the bank.

Q. And where she commenced to take this sheer was about one hundred and fifty feet from the eastern shore?

A. One hundred and fifty, possibly; between one hundred and fifty and two hundred feet from the shore, yes.

Q. So she ran one hundred and fifty to two hundred feet toward the beach against your control? A. Yes.

Q. That would be on her starboard side as she was coming down the river? A. Starboard side.

Q. On her port side how far was it deep water, on her port side?

A. Well, there is a channel there probably three hundred feet wide, or three hundred fifty at that stage of water. At that stage of water the channel in that vicinity was approximately three hundred feet wide.

Q. That is the navigable channel?

A. Well, in a sense it is navigable, but it shoaled—

Q. (Interrupting.) Well, navigable for your boat, wasn't it? [46]

A. Yes, but it runs to an island and it shoals

(Deposition of Olaf F. Hegdale.)

all the time gradually, gradually all the time out, and the deepest water is next to the east shore.

Q. How much did your boat draw?

A. She draws about five feet of water when she is loaded.

Q. How deep was the water at this deepest point that you were seeking? A. Seeking?

Q. Yes; this deepest point where you were trying to keep her.

A. Why, the shoalest place on the crossing there at that stage was probably ten or eleven feet of water.

Q. And you had on your port side navigable water for your boat for a width of one hundred fifty feet or more?

A. Possibly a hundred feet. She could be navigated probably one hundred feet further.

Q. I thought you said the channel was three hundred feet wide?

A. Well, approximately. I was between one hundred and fifty and two hundred feet from shore, and the channel is approximately between two hundred and fifty and three hundred feet wide at that stage of water that she would not strike.

Q. How big a boat is the "Ruth"?

A. Her tonnage is four hundred and—I have forgotten her gross tonnage. I think it is four hundred and odd tons, I don't know, gross.

Q. How long is she?

A. Her hull is one hundred fifty-six and some tenths.

(Deposition of Olaf F. Hegdale.)

Q. What is her beam?

A. Her beam was thirty-four feet.

Q. What horsepower are her engines?

A. Well, I don't know exactly; approximately four hundred, [47] three hundred and fifty or four hundred.

Q. What sort of steering gear has she?

A. She had hydraulic and hand power auxiliary.

Q. What sort of rudders?

A. What sort of rudders?

Q. Yes.

A. She has the regulation rudders used on river steamers, four mains and two monkeys.

Q. What is her speed when she is full speed in slack water?

A. Oh, that varies according to load; approximately ten miles an hour, I should judge. She is about a ten mile boat.

Q. How long does it take to stop her under these conditions, slack water, going ten miles an hour?

A. Slack water, about six or seven hundred feet.

Q. Bring her to a dead stop in that time—in that distance, I mean?

A. Well, this is in reference to the boat being light. Now there is conditions and a difference when—

Q. (Interrupting.) Now, let's talk about her as she was loaded at this time.

A. At that time I would have to have about eight or nine hundred feet, loaded.

Q. Why, was she loaded heavier than usual?

(Deposition of Olaf F. Hegdale.)

A. No, she wasn't loaded heavier than usual.

Q. What is the ordinary load you carry on her?

A. Somewhere around two hundred tons.

Q. Was that what she had on this day?

A. Two hundred and something, two hundred and a few tons, maybe.

Q. Two hundred and what?

A. Two hundred tons approximately. She might have been a little [48] over. The average load we would run would average about two hundred. She would go up to two hundred thirty, and I think I have had two hundred and forty on her at frequent intervals, but the average load was about two hundred tons.

Q. Well, what is the nearest you can come to stating what she actually had on this time?

A. Well, it is so long ago I don't hardly remember, but I think she had a little over two hundred tons. She might have had two hundred ten or two hundred twelve, something like that. She frequently had two hundred forty tons on her, and she had carried three hundred tons.

Q. You didn't try to beach her at all?

A. Indeed not.

Q. You had no reason for wanting to beach her?

A. No; my only reason was to keep her off of the beach.

Q. Just make a rough drawing there, just a sketch of the Willamette River, showing where the Clackamas comes in.

A. Showing where the Clackamas comes in?

(Deposition of Olaf F. Hegdale.)

Q. Yes. I will illustrate what I mean. What I mean is this: (Proctor here made a rough pencil sketch.) Call that the Willamette; I don't know whether it is straight or crooked; the Clackamas comes in something like that. I am not asking you for a map to scale.

A. How far do you wish to go above, just a little ways?

Q. To this place you are talking about.

A. All right; you want me to draw approximately a rough sketch of the channel where I went, and the river.

Q. Yes; I wanted you to show that second channel you spoke of. A. The second channel?

Q. Yes; you said there were two channels. You said there was [49] a high water channel and another channel.

A. All right. (Witness draws sketch.) There is the approximate lay of the river. Here is the channel that I come down; there is the Clackamas River; here is where she stranded, right about there; this is the other channel that comes around, and they both come together just at the foot of this island.

Q. Oregon City is up here (indicating,) isn't it?

A. Oregon City lays around the turn.

Q. Will you prolong that up there just a little and show the way the river runs toward Oregon City.

A. I have got this a little out of proportion, I think. This here is Rocky Reef that comes out

(Deposition of Olaf F. Hegdale.)

here; then it comes in in this shape, and then goes up, and this is just the same (witness drawing and modifying previous drawing). This is about the way it is.

Mr. MONTGOMERY.—Mark that thing you referred to as a reef.

Mr. WOOD.—I am going to have him mark them all. I will mark it Rocky Reef.

WITNESS.—The Clackamas River is over there.

Mr. WOOD.—I will put that arrow for the current.

WITNESS.—Pardon?

Mr. WOOD.—I say the current is this way.

WITNESS.—The current is that way. It would be drawn for both rivers, that way.

Mr. WOOD.—This would be the current (drawing another arrow). This is what we call the eastern shore here?

WITNESS.—That is the east shore there, yes, sir.

Mr. WOOD.—And this is the western; is that right?

A. Yes. It is not absolutely true east or absolutely west, but it would be the westerly and easterly shores. That is as near [50] as we can come to it.

Q. Now, will you mark approximately that point of the stranding?

A. The point of the stranding; well, approximately from that island it would be about there (witness marked same). Now, I want to explain to you

(Deposition of Olaf F. Hegdale.)

that this here is not an island at this stage of water but only in the lower stage. At this stage I went through there this island was submerged.

Q. I will say "submerged island."

A. Submerged island. That would be proper, because it was submerged on that day. The only thing on the island is a little bit of cottonwood brush that grows under the water. It is just really a big gravel pile; that is what it is.

Mr. WOOD.—Well, I will say "gravel bar submerged at this stage of water"; is that right?

A. Yes, that would be proper. Just let me have that a minute. I have got this really wrong to show the condition of this channel on the other side. (Witness changes his previous drawing.) It comes out almost square here, and this one comes this way. That is a little more like it. It is almost a square turn on the other channel.

Mr. MONTGOMERY.—For the purpose of clarity, you were referring by "the other channel" to the western shore?

A. Yes.

Mr. WOOD.—I was going to mark these channels.

Q. Now, what is this channel that goes down next to the western shore? You referred to it by some name, as high water or low water channel?

A. That is the low water channel.

Q. Shall I mark it such?

A. Yes, you can mark it the low-water channel. The other [51] channel is not deep enough.

(Deposition of Olaf F. Hegdale.)

Q. This is the high-water channel?

A. That is the high-water channel.

Mr. MONTGOMERY.—What do you mean by “the other channel”?

WITNESS.—Which?

Mr. MONTGOMERY.—From the standpoint of the western or eastern channel, what do you mean by “the other channel”?

A. Well, the western channel is the low water channel and the eastern channel is the high water channel.

Q. (By Mr. WOOD.) And at this high stage of the water you prefer the high water channel for what reason?

A. It is much straighter.

Q. Wider? A. Yes, and wider.

Q. And how does the current compare in the high water channel with that in the low-water channel?

A. Approximately the same.

Q. At this stage of water we are talking about all the time.

A. Approximately the same.

Q. And this high water channel is approximately at this stage of water three hundred feet in width?

A. Two hundred fifty feet in width, I should judge.

Q. Is it about the same width all the way down, or is it narrower up at the head and wider at the bottom, or how is it?

A. It holds almost the same width clear through

(Deposition of Olaf F. Hegdale.)

past the big bar there. It narrows, if anything, right down here, and when you come out by the island it narrows between two little sand bars but it is hardly enough to mention.

Q. What was your reason for sticking the vessel's nose into that slack water? [52]

A. To keep from going on the shallow water on the gravel bar.

Q. Where was it? You can mark on there about where it was, that the vessel's nose got into the slack water and you began to lose control of her.

A. Let's see. You want me to mark a place there where I knew I had lost control of the vessel? Is that what you mean?

Q. Well, as I understand it you say that you lost control of the vessel because in keeping over toward the starboard in order to avoid the gravel bar you got her nose into the slack water and then you could not bring her back into the swift water again because the swift water swung her stern downstream. Have I got your theory right?

A. No, I don't think you have.

Q. All right; then I am glad to know it.

A. I don't think I stated I got her nose into the slack water before I lost control of her.

Q. Well then, I will ask you please to state it again.

A. I held over towards that and she did get in the slack water after she would not come out fast enough. She wasn't in the slack water when I started to back.

(Deposition of Olaf F. Hegdale.)

Q. When you say, "Started to back" you don't mean back the engines, do you? A. Yes, sir.

Q. Oh, you do?

A. Yes, sir. When I seen that she would not answer, that she would not come fast enough, I made up my mind on the acute danger I had and immediately reversed the engines and started back full speed astern to check her headway, to stop her, if possible, and back her out if she would not come out otherwise.

Q. You were backing her against the current then? [53]

A. I was backing her against the current as strong as I could so as to swing her bow out. When she struck the gravel here on the shore, why, her headway was greatly stopped but not entirely, because I could not stop her in that short distance in the current.

Q. Now, I wanted to know approximately whereabouts in that channel it was that you commenced to back her?

A. Commenced to back her?

Q. That is, when you first realized that you hadn't control over her?

A. Approximately just really passing the mouth of the Clackamas in the lower edge of the Clackamas River, right about here (indicating on sketch).

Mr. MONTGOMERY.—Make a cross, I suggest.

WITNESS.—All right; right there (witness making cross on sketch). That is probably where I commenced backing her.

(Deposition of Olaf F. Hegdale.)

Mr. WOOD.—All right. I will write there “commenced to back.”

Q. And how far did you proceed before you hit the bank?

A. Let's see; close on to a thousand feet, between eight hundred and a thousand feet.

Q. Have you any better control over your boat when you are backing her than when you have got your engines full speed ahead, or, I won't say full speed ahead but going ahead?

A. Have I better control?

Q. Yes, when backing. I notice you backed her when you wanted to resume control.

A. Why certainly, if the boat makes a run for any object that you don't want to hit, your only resource is to back her. You certainly have better control backing her against her [54] rudders than you have going ahead, as well as stopping her headway. A stern-wheel steamer will answer her rudders as quickly or quicker by backing than it will by going ahead.

Q. That is what I thought. A stern-wheel throws the water from the paddle wheels against the rudders?

A. Right up against the blade of the rudders, and when you are steering ahead you only get the speed of the boat in the current.

Q. Did she respond to her helm when you began to back there readily?

A. She responded but not readily enough to clear the bank.

(Deposition of Olaf F. Hegdale.)

Q. Did she swing her bow somewhat to port?

A. She swung her bow somewhat to port but not enough to miss.

Q. How were you navigating your boat with respect to your engines at the time you commenced to back her there? Were you going full speed ahead or half speed?

A. Half speed ahead.

Q. Or what were you doing?

A. Half speed ahead.

Q. You would have a better control of her, however, going down through that rapid water if you had drifted or had been backing your engines, wouldn't you?

A. No, not necessarily. I have gotten in trouble drifting it just as well as I have when going ahead.

Q. Now you admit you have got better control over these stern wheel boats when you are backing them than you have going ahead?

A. In some instances, yes, sir.

Q. Especially in swift water?

A. Not in all cases. There is cases where we have to run full speed ahead to make a safe passage through places, just in accordance [55] to the conditions of the river.

Q. Did you ever navigate in Alaska?

A. I have not.

Q. Well, isn't it a fact that generally boats coming down through rapids come through with their engines backing?

(Deposition of Olaf F. Hegdale.)

A. There is if the rapids are crooked or cross currents.

Q. Well, that is what this was?

A. I have stated before that this is not a rapid at this stage of the water; it is just simply a straight, strong current.

Q. But very swift? A. Very swift.

Q. Don't you think that you would have had better control over your boat if you had gone into that rapid, or into that swift water there with your engines slowly reversing, say, instead of going half speed ahead?

A. I certainly didn't think so at the time. If I had I certainly would have backed her and drifted her.

Q. How much does she draw when she is light?

A. She draws about twenty-seven inches light.

Q. So that your load that you had on her at this time, which you say is something over two hundred tons, would submerge her about three feet more?

A. A little bit less than three feet; approximately.

Q. Giving her a total draft of around five feet?

A. Around five feet; yes, sir.

Q. You were going down there approximately the middle of that channel, weren't you?

A. I aimed to hit it as near the middle as I could. That was the idea.

Mr. WOOD.—That is all. [56]

Redirect Examination by Mr. MONTGOMERY.

Q. It had not been your custom, Captain, to go through this particular swift water to which coun-

(Deposition of Olaf F. Hegdale.)

sel has referred, with your engines reversed, had it, up to that time?

A. Never; never go that channel with the engines reversed.

Q. Now referring to the chart which you have drawn here, which I will ask the reporter to designate as Hegdale's Exhibit 1, with consent of counsel,—I understood you, did I not, that in passing through that portion designated as the high water channel in close proximity to your designation "X" that you had possibly one hundred or one hundred fifty feet of water on the port side between you and the gravel bar?

A. Approximately one hundred fifty feet that the vessel would not hit on; but it was shoaling; it shoals gradually towards this bar, and it is deep when you get close to the other shore and our main point was to keep as close to the deepest water so that the vessel will answer, will steer better. If you run a vessel on to a shoal, the shoal side of a channel too close, she has a tendency to suck that way more or less, and not answer so good. That was my idea of holding over to the other shore, so as to stay in the main part of the channel as much as possible, the deepest channel, right in the middle.

Q. Now were you present at the time of the government inspection prior to the time of the accident referred to in this case? A. I was.

Q. Do you know to what extent that inspection was made at that time by the government officers?

A. They were making that inspection just as

(Deposition of Olaf F. Hegdale.)

thorough as any [57] inspection, and they found all defects and condemned a few little things, as they always do; but with the equipment, I was through with one of the inspectors in the hold myself.

Q. And were all their requirements conformed to?

A. All of the requirements were conformed to, with the exception of a piece of hose, I think, that had to be replaced, or something like that.

Mr. MONTGOMERY.—I think that is all.

Recross-examination by Mr. WOOD.

Q. When you said that you went towards the shoal water there was a tendency to suck that way, what way did you mean? Did you mean suck off toward the shoal water further?

A. Yes; you have a tendency to get on shoal water and she wants to run that way a little more, and that is your object in staying as near the middle of the channel as you possibly can when it is shallow on both sides.

Q. When you navigate this low water channel do you go down there with engines half speed ahead?

A. That channel is too crooked to run at all; you have always got to drift it.

Q. You always drift that?

A. Always drift that, starting around here, clear through. You never can run that channel.

Mr. MONTGOMERY.—Starting over here at what point?

(Deposition of Olaf F. Hegdale.)

A. Starting at the Rocky Reef; that point. We start there and drift around all the way through. We never can run in there.

Q. (By Mr. WOOD.) And you control your boat, guide her while drifting, how—by reversing your engines from time to time? [58]

A. By reversing the engines and changing the rudders from time to time, according to the position of the vessel.

Q. But changing your rudder doesn't do you any good if your boat is just moving along at the same rate with the water; you have got to reverse your engine, haven't you, to give effect to the rudder?

A. Certainly; yes.

Q. And that gives you better control in going through this bending channel?

A. That is about the only way we can go through that channel.

Q. Well, why is it the only way?

A. Because it is too crooked.

Mr. WOOD.—You didn't introduce this. Do you want me to introduce it?

Mr. MONTGOMERY.—Yes, I would like to have you introduce it.

Mr. WOOD.—We will introduce it as Respondent Hegdale Exhibit 1.

(The sketch made by the witness, as shown above, so offered, was thereupon marked Respondent's Hegdale Exhibit 1 and is attached hereto and made a part of this deposition.)

(Deposition of Olaf F. Hegdale.)

Q. You said that you had experienced these sheers before with the "Ruth"?

A. With any boat. Steering in swift currents she will once in a while take a little sheer.

Q. Well, this wasn't a little sheer; this was a sheer that got beyond you. Did you ever experience before this anything more than just little sheers?

A. I have often had them; have sometimes had them barely escape, and in speaking of the low water channel in drifting there, I have got in trouble with that channel only last year [59] with the steamer that I am running now; I got in trouble there and got crosswise, drifting through, going as slow as I possibly could go.

Q. On account of the sheer?

A. On account of the sheer. The current just took a sheer and carried the steamer around absolutely against my wishes and all I could do. The steamer was landed there across that channel. It was too shoal for the steamer to turn around.

Mr. MONTGOMERY.—By that channel you mean—

Mr. WOOD.—(Interrupting.) The low water channel?

WITNESS.—The low-water channel was too shoal for the steamer to turn around, and she just took simply the same thing on me there, and her nose stuck in the gravel on one side and her stern landed on the other. But I had her in such control at that time that she didn't do any more damage

(Deposition of Olaf F. Hegdale.)

than tear out the rudder and the wheel, but no damage to the hull.

Mr. WOOD.—That is all.

Redirect Examination by Mr. MONTGOMERY.

Q. Your method of navigating the high-water channel and the low water channel is entirely different, if I understand you correctly, is it not?

A. Entirely different.

Q. And what is the primary reason for that difference?

A. The primary reason is that the low-water channel cannot be navigated by steering full speed ahead, or steering at all, except by backing and drifting. The high-water channel is pretty near straight and you can make it with much greater safety by steering straight ahead than you could in any other way, to my way of thinking. [60]

Q. How do the two channels appear from the standpoint of safety at this particular period of the stage of the water such as existed at the time of this accident?

A. In my judgment the high-water channel was as safe as the other.

Recross-examination by Mr. WOOD.

Q. Now, Captain, that last question of yours compels me to resume my examination. I thought I had finished. You say you can navigate this high water channel with greater safety by going half speed ahead? A. Yes.

Q. Will you please explain why that is so, when

(Deposition of Olaf F. Hegdale.)

you have just told me that you could control your boat better by drifting and reversing your engines, and that that is the very reason you so navigate in the low-water channel, because it is a crooked channel and you want to control your boat better? Now, why do you say that the high-water channel can be navigated with more safety going with your engines ahead than drifting and reversing them?

A. It is simply the same as any other part of the river in high water; it is a comparatively straight current and we can navigate that part of the river with as great a safety in that stage of water as we can almost any part of the river.

Q. Yes, but you can navigate it with still greater safety if you are drifting? •

A. I don't know that you can.

Q. And with your engines reversed, as the occasion requires, can't you?

A. I don't think that I could. [61]

Q. Why not, if drifting and reversing your engines give you better control of your boat?

A. In this case it does not; because if I drift I never go outside of the channel, and if I don't drift I go there, and when the water is high—

Q. (Interrupting.) What side of the river?

A. The high-water channel, the west—or the east shore channel; I have never drifted that channel. When it is so I can't run that with safety I never go there. I go the other channel, the low-water channel.

(Deposition of Olaf F. Hegdale.)

Q. Well, you could not run it with safety at this time?

A. Well, it is a condition that existed, and a peril of the sea that no one can foresee.

Q. Do you mean to tell me now, Captain Hegdale, that after having stated that you have got better control of your boat in the swift water drifting, do you mean to say that if you had drifted the high-water channel at this time you could not have kept your boat from stranding?

A. If I had drifted her in that stage of water in the high-water channel I would have had more difficulties.

Q. What would they be?

A. Because the current would probably set me one way or the other on some other bar, if one were ahead.

Q. And if the current had tried to do that you could have better controlled your boat drifting and reversing than going ahead with her?

A. No, not in that channel, because I could not hold the speed of the boat. The current was too great to stop the boat entirely at any place in that current, and the only safe way was to run it through, and it would steer through excepting for a [62] condition which I could not foresee.

Q. You mean to say then that in currents that are very swift it is safer to go fast than slow?

A. In a good straight current it is just as safe in my opinion, just as safe in a good straight cur-

(Deposition of Olaf F. Hegdale.)

rent; it is just as safe—or a straight river, or comparatively straight.

Q. Well, this wasn't so straight but what you ran your nose into slack water and got twisted around; so it wasn't straight?

A. A perfectly straight river might cause the same thing, if the boat for some unaccountable reason had done the same trick; if it was absolutely an air line it would do the same thing; if it took a sheer for the shore it would do the same thing. A slight bend in the river would have nothing to do with that.

Mr. WOOD.—That is all.

Redirect Examination by Mr. MONTGOMERY.

Q. How many times approximately prior to this accident had you navigated the high-water channel referred to on chart Hegdale Exhibit 1, in terms of months and years? A. How many times?

Q. Yes.

A. Why, different times when this stage of water permitted, for all the time I have run on the Willamette River.

Q. And how many years is that?

A. I have been on the Willamette River for over twenty years—twenty-two years.

Q. And the judgment which you exercised at this particular time was the judgment based on the experience of the past, was it? A. Yes.

Mr. WOOD.—Wait a minute. I object to that as leading and [63] move to strike it out.

(Deposition of Olaf F. Hegdale.)

Mr. MONTGOMERY.—Well, I will withdraw the question in the form presented and ask you on what you based the judgment which you exercised at this particular time in passing through this high-water channel?

A. On previous times that I ran through on the same conditions.

Mr. MONTGOMERY.—That is all.

Recross-examination by Mr. WOOD.

Q. At this stage of the water how did you navigate the "Ruth" coming up the river through that water?

A. Steered her right straight up through.

Q. Did you have to rope her up on the bank?

A. No, sir.

Q. What do you call that method where you put a line up? A. Lining.

Q. You didn't have to line her up?

A. No, sir.

Q. She had enough power to go through that swift water? A. Yes, sir.

Mr. WOOD.—That is all.

Mr. MONTGOMERY.—You mean by the swift water that high-water channel, Captain?

A. Now, I will explain that. She will go up the river, and for one thing she hasn't got usually the heavy load and she would go with the same load, she will turn around and steam upstream; but going downstream a steamer hasn't got the power backing that it has to push ahead; she will run ahead probably ten miles an hour. Well, the best

backing speed you can get for her will be six or probably less. [64]

Mr. WOOD.—That is all.

Mr. MONTGOMERY.—That is all.

And further deponent saith not.

Signature waived. [65]

United States of America,

State of Oregon,

County of Multnomah,—ss.

I, Alva W. Person, a Notary Public for Oregon, duly commissioned, qualified and acting, hereby certify that pursuant to and by virtue of the attached stipulation between the proctors for the respective parties in that cause of libel pending in the Southern Division of the United States District Court for the Northern District of California, First Division, wherein Willamette Navigation Company, a corporation, is Libelant, and Hartford Fire Insurance Company, a corporation, is Respondent, I took the deposition of Olaf F. Hegdale, a witness on behalf of the Libelant, on the 9th day of March, 1921, beginning at the hour of eleven o'clock A. M. and concluding at 12:15 o'clock P. M. of said day, at the office of Messrs. Platt, Platt, Montgomery & Fales, Room 619 Platt Building, Portland, Oregon; that at said time and place Mr. Hugh Montgomery appeared as proctor for Libelant and Mr. Erskine Wood appeared as proctor for Respondent; that before taking said deposition tht said Olaf F. Hegdale was by me duly sworn to tell the truth, the whole truth and nothing but the

truth concerning the matters in controversy in said cause; that said deposition was conducted by oral questions and answers, and said oral questions to and answers of said witness were by me taken in shorthand and thereafter transcribed, and the foregoing transcript, pages numbered 1 to 28, both inclusive, contains a true and correct record of said deposition so given, the witness' signature thereto having been expressly waived by the attached stipulation. [66]

I further certify that I have no interest in any manner whatsoever in the outcome of said cause; that I am not related to, in the employ of, or in any way connected with the parties to said cause or the proctors for the respective parties.

In witness whereof I have hereunto set my hand and notarial seal this 10th day of March, 1921.

[Seal]

ALVA W. PERSON,
Notary Public for Oregon, Residing at Portland,
Multnomah County, Oregon.

My commission expires July 28, 1924.

Notary's fee and stenographic services taking above deposition and preparing transcript, \$19.00.

Paid by Libellant.

ALVA W. PERSON,
Notary Public for Oregon.

[Endorsed]: Filed Mar. 23, 1921. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [67]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,514.

Before Hon. M. T. DOOLING, Judge.

WILLAMETTE NAVIGATION COMPANY, a
Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE COMPANY,
a Corporation,

Respondent.

(Testimony Taken in Open Court.)

THURSDAY, JUNE 23, 1921.

Counsel Appearing:

For Libelant: IRA S. LILLICK, Esq.

For Respondent: L. T. HENGSTLER, Esq.

Mr. LILLICK.—If your Honor please, this is an action brought by the Willamette Navigation Company, a corporation, against the Hartford Fire Insurance Company, a corporation, upon a policy of insurance, a copy of which is attached to the libel, under which the Hartford Fire Insurance Company, in consideration of a \$1500 premium, insured the Willamette Navigation Company for account of themselves, loss, if any, payable to assured, to the amount of \$20,000, on paper in rolls and/or bundles, and/or packages, and on merchandise and/or supplies, while on board the steamer "Ruth,"

and/or "N. R. Lang," at and from Oregon City, Oregon, to ports and places in the Willamette and/or Columbia Rivers and tributaries, [68] and from Portland, Oregon, and ports and places in the Willamette and/or Columbia Rivers and tributaries to Oregon City, Oregon, direct or via ports and places; warranted not to use ports and places below Astoria or above Cascade Locks on the Columbia River, or above Pulp Siding, on the Willamette River.

The terms of the policy provided that in case of a total or partial loss of any cargo while on board the steamer "Ruth" or the steamer "Lang," coming down the Willamette or Columbia Rivers, the company shall not be liable in excess of \$8000. It is a form of policy which is known, I believe, as an open policy; in any event, it was a policy written to cover the Willamette Navigation Company on cargoes carried by either of those two steamers down the river.

The "Ruth," on the 11th day of January, 1913, loaded some paper from the paper mills of the Willamette Pulp & Paper Company. The Willamette Navigation Company, owning these two boats, and acting for the Willamette Pulp & Paper Company, took on board two consignments of paper, one consignment of paper belonging to the Crown-Columbia Paper Company, which consignment, with the loss that ensued, amounted, in its damage, to \$1158.80; the other consignment belonging to the Willamette Pulp & Paper Company, and the loss

upon that amount to \$5621,85, which is the amount for which we are suing.

The libel alleges that libelant is an Oregon corporation. The answer denies that. Do you stand on that denial, Mr. Hengstler?

Mr. HENGSTLER.—No.

Mr. LILLICK.—Then it will be admitted that the Willamette Navigation Company is an Oregon corporation.

Mr. HENGSTLER.—Yes.

Mr. LILLICK.—The answer alleges, and the libelant admits, [69] that the Hartford Fire Insurance Company is a corporation organized under the laws of Connecticut, doing business in San Francisco and elsewhere in marine policies.

The libel alleges that on the 20th day of May, 1921, the Hartford Fire Insurance Company, for a consideration of \$1500 paid by the Willamette Navigation Company to it, issued and delivered to Libelant, with loss, if any, payable to the assured, its policy of insurance numbered 304, the original of the exhibit attached to the libel, in which the Libelant was insured to the amount of \$20,000 on paper in rolls and/or bundles, and/or packages, while on board the steamer "Ruth," for the term, between the places, and subject to all the terms and conditions set forth in the original policy, numbered 304. That part of the libel is admitted by the answer, with the statement that as to the allegation which I have read, almost word for word, from paragraph III of the libel, insured the Willamette Navigation Company, under the terms and

conditions of the policy, the answer adds, "and not otherwise."

Mr. HENGSTLER.—That means that it is subject to the terms of the policy, and not otherwise.

Mr. LILLICK.—Yes. So that the admission is that policy No. 304 was issued, the premium upon it, \$1500, was paid, and that the policy insured, as stated in the policy.

The next allegation is: "That on or about, to wit, the 11th day of January, 1913, certain paper, in rolls, was placed in the custody and care of the Libellant herein, at the port of Oregon City, Oregon, and Libellant agreed to deliver the same by the S. S. "Ruth" in good order and condition at the port of Portland, Oregon.

Mr. HENGSTLER.—We admit that. And will you admit that the "Ruth" is a common carrier?
[70]

Mr. LILLICK.—In this sense, Mr. Hengstler: I wish to have before the Court, because of your defense as to the possibility of insurance upon the cargo, that the term "common carrier" be defined as the facts in the case would warrant its being defined, and by submitting to the Court, for the Court's determination upon that point, the bill of lading under which the cargo was carried. I think you and I can agree on the facts as to that. I will offer in evidence the bill of lading under which this was carried. It will be for the Court, then, I take it, to determine whether or not it was as a common carrier.

Mr. HENGSTLER.—You did carry cargo for different people?

Mr. LILLICK.—I think that will be true. Perhaps Mr. Whitney will be able to give me that information. Personally, I do not know exactly what the fact is, Mr. Hengstler. In this particular cargo, there were two consignments, one belonging to the Crown-Columbia Pulp & Paper Company, and the other to the Willamette Pulp & Paper Company. It is my understanding that the paper company sold their product by agreement under which the paper was delivered to the vessel and the title then passed. So that it might belong to any one of a number of people.

Mr. HENGSTLER.—I don't know anything about that.

Mr. LILLICK.—Neither do I; that is only my understanding. Perhaps we had better have that developed.

I am making rather a full statement to the Court, because Mr. Hengstler and I, I think, will agree upon practically all of the points as to the facts; we are widely divergent as to the law.

The libel alleges, further, that after the policy had attached, and on or about the 11th day of January, 1913, the steamer "Ruth," with this paper in rolls on board, set sail upon a voyage from the port of Oregon City, Oregon, to the port of Portland, [71] and during the course thereof, and while said paper in rolls was on board said steamer "Ruth," and said policy was still in force, the said

steamer stranded and sunk in the Willamette River near the port of Gladstone, Oregon.

I think, Mr. Hengstler, you will admit all of that down to the point as to whether or not the steamer stranded and sank. We have a deposition on file which will be, perhaps, the only testimony with respect to what happened to the steamer.

Mr. HENGSTLER.—I don't think that is so. I think there are answers to your interrogatories which give an entirely different version to this accident. The deposition says one thing and the interrogatories give an entirely different version.

Mr. LILLICK.—Then we will have to leave that to the Court to determine. In any event, what I have read, down to whether or not the steamer stranded and sank, will be admitted, will it not?

Mr. HENGSTLER.—No, I cannot admit it, because you, on your side, under oath, gave two entirely different versions of the accident. We know nothing about how the accident happened.

Mr. LILLICK.—Pardon me, Mr. Hengstler, I am not speaking of that, I am trying to take out of the allegation that part of it which you deny. The first portion that I have read you will, I take it, admit: That after the policy had attached, and on or about, to wit, the 11th day of January, 1913, the said steamer "Ruth," with said paper in rolls on board, set sail upon a voyage from said port of Oregon City, Oregon, to said port of Portland, and during the course thereof, and while said paper in rolls was on said steamer "Ruth," and said policy was still in force— [72]

Mr. HENGSTLER.—I admit everything down to that point.

Mr. LILLICK.—Then that is admitted. As to what happened will be for the Court to pass upon. What we have alleged as happening is that the steamer stranded and sunk in the Willamette River near the port of Gladstone, Oregon.

Then, following that out, Mr. Hengstler, no doubt you will admit that the paper was damaged by reason of what happened to the vessel; in other words, the paper was damaged. The amount of that damage you are not willing to admit, I take it, but you will admit that the paper was damaged?

Mr. HENGSTLER.—Yes.

Mr. LILLICK.—We then allege that the damage that ensued to that paper amounted to \$5153.20, and that due to certain of the paper that was insured under the policy having been saved, salvage charges amounting to \$468.65 became due under the terms of the policy for the salving of that cargo. The terms of the policy covering, as they do, salvage charges, we will look to the Court for a decree permitting us to recover that salvage.

Our next allegation is that the libelant, to whom the said policy was, by its terms, made payable in case of loss—

Mr. HENGSTLER.—Pardon me, there is another allegation, that no part or portion of said sums have been paid.

Mr. LILLICK.—Yes, that is right at the very end of the other allegation; I didn't omit it for any reason, Mr. Hengstler; of course, it has not been

paid, and that is the reason we are here suing. I also allege that no part or portion of said sums have been paid. By the answer, Mr. Hengstler sets up a receipt in full from the Willamette Navigation Company for the loss suffered in this particular accident, and which receipt recites that the sum of \$1158.80 was paid to the Willamette Navigation [73] Company, and for that the Willamette Navigation Company gave a receipt in full. Perhaps the denial upon the part of the insurance company that no part or portion of \$5153.20 and \$468.65 has been paid is due to the defense that the company claims that this \$1158.80 was \$1158.80 which applied in part to this other loss.

Mr. HENGSTLER.—We claimed that we settled this loss because it was a receipt in full settlement.

Mr. LILLICK.—I take it that your denial of our allegation is based on the claim on your part that the payment of \$1158 is payment in full.

We expect to show there were two consignments of paper on the "Ruth," one belonging to the Crown Columbia Pulp & Paper Company, the loss on which amounted to \$1158.80; and another belonging to the Willamette Pulp and Paper Company, the loss on which amounted to \$5153.20, plus the salvage charge of \$468.65, which has not been paid, according to our contention.

The next allegation of the libel is that the libellant, to whom the said policy was, by its terms, made payable in case of loss, has kept and performed all of the conditions of said policy named upon its part to be kept and performed, and made proofs

of loss of said salvage charges, and requested the respondent to pay the same, but the respondent has not paid, and refuses to pay the same, or any part or portion thereof. This is denied, and, therefore, puts upon us the burden of proving the fact that we made proofs of loss.

The pleadings leave, I think, for the Court's determination as to facts, but a very few issues, the main contention upon our part, which is denied by Mr. Hengstler, will call upon the Court to pass upon questions of law rather than questions of fact. [74]

I think that is a full statement of the case, Mr. Hengstler.

Mr. HENGSTLER.—Yes. It will very largely hinge upon questions of law.

Mr. LILLICK.—We offer in evidence the deposition of the captain of the "Ruth." The deposition was taken before a notary public in Portland, Oregon.

The CLERK.—I do not think it has been filed.

Mr. LILLICK.—I don't know where it could be. Perhaps Mr. Hengstler and I can agree on a copy.

Mr. HENGSTLER.—The deposition must be here.

Mr. LILLICK.—Well, anyhow, the Court, no doubt, would not care to have us read the deposition. The case will be submitted on briefs, anyway, and if Mr. Hengstler will permit that course to be followed, and if it is agreeable to your Honor, because I am not prepared to argue the case this morning. If that is satisfactory to the Court,

the deposition may be offered in evidence and considered read. I will see to it that it is on file.

Mr. HENGSTLER.—If it is satisfactory to the Court that the case should be submitted that way, it will be satisfactory to me.

Mr. LILLICK.—If the deposition is not found in the postoffice I will leave my copy. It is the deposition of Olaf Hegdale.

Mr. HENGSTLER.—And you offer the direct examination and cross-examination, as well?

Mr. LILLICK.—I am offering the whole deposition. Is there any new matter in the cross-examination that I might object to, Mr. Hengstler? Is that what you have in mind?

Mr. HENGSTLER.—No. I simply wanted to know whether you were offering the direct examination and also the cross-examination. [75]

Mr. LILLICK.—I am concerned about Mr. Hengstler's statement. You certainly won't offer your cross-examination. I don't want to be bound by any seeming offer that would bind me to what the witness said, or offering the deposition simply so far as my direct examination is concerned.

The COURT.—If you put a witness on the stand and something develops on cross-examination, you cannot stand from under it by saying you only offer the direct examination.

Mr. LILLICK.—I never heard of the matter being suggested before, your Honor, and it makes me a little curious to know just what was in Mr. Hengstler's mind. I don't know what Mr. Heng-

(Testimony of Adam Gilliland.)

stler's point might be, but we offer the whole deposition in evidence.

We call upon the respondent for a letter written by me to Mr. Gilliland, under date of June 13, 1913, with the enclosure referred to in that letter.

Mr. HENGSTLER.—Do you want the original, or have you the copy, Mr. Lillick?

Mr. LILLICK.—I have the copy. What I was particular about having in evidence was the statement of the loss that was appended to the letter.

Mr. HENGSTLER.—You mean the proof of loss?

Mr. LILLICK.—It is referred to in the letter as the statement of loss.

Mr. HENGSTLER.—I have the original letter here, Mr. Lillick, but there is no statement of any loss.

Mr. LILLICK.—Is Mr. Gilliland here?

Mr. HENGSTLER.—He will be here—oh, yes, he is here now.

Mr. LILLICK.—Then I will call Mr. Gilliland to the stand. [76]

Testimony of Adam Gilliland, for Libelant.

ADAM GILLILAND, called for the libelant, sworn.

Mr. LILLICK.—What is your connection with the Hartford Fire Insurance Company?

A. Assistant General Agent.

Q. And what was your connection with that company on June 13, 1913?

A. I think it was the same. I have forgotten the exact date on which the appointment was made.

(Testimony of Adam Gilliland.)

Q. I hand you what purports to be a letter signed by me, dated June 13, 1913, and ask you whether you remember having received that letter upon or about the 13th of June, 1913?

A. I have no distinct recollection of it; I may have.

Q. You say you may have received it. Have you any recollection of having handed this particular letter which I hold in my hand to your counsel?

A. No, I have not. I handed all the papers in my possession to counsel, but in the intervening years I paid little or no attention to it.

Q. Do I understand you that you have no recollection of having received this letter from me?

A. No, I have no distinct recollection of that particular letter.

Q. How many letters have you ever received from me?

A. I could not say. I have not refreshed my memory recently, and seven or eight years have elapsed, during which time I have paid no attention to the matter, and naturally I have forgotten these particular matters.

Mr. LILLICK.—Mr. Hengstler, will you admit that this letter was delivered to you by the Hartford Fire Insurance Company in connection with the facts that were submitted to you by that company regarding this case?

Mr. HENGSTLER.—Very likely. They were delivered to Judge Coogan, and very likely Judge Coogan got it from the Hartford [77] Fire In-

insurance Company. There is no question about that.

Mr. LILLICK.—I was going to take the stand to testify to it myself.

Mr. HENGSTLER.—Oh, no, there is no question about its being written by you. That is your signature.

Mr. LILLICK.—And you got it from the files of the Hartford Fire Insurance Company?

Mr. HENGSTLER.—I got it either from the files of the Hartford Fire Insurance Company, or from Judge Coogan, who received it from the files of the Hartford Fire Insurance Company.

Mr. LILLICK.—I offer this letter in evidence, and I will read it.

Libelant's Exhibit No. 1.

(Letterhead of IRA S. LILLICK.)

“San Francisco, June 13 1913.

“Adam Gilliland, Esq.,

Assistant General Agent,

Hartford Fire Insurance Co.

430 California St., San Francisco.

“Dear Sir:—

“Enclosed herewith please find statement of loss of Willamette Pulp & Paper Co., on steamer ‘RUTH,’ claim for which has been made against the Willamette Navigation Co., which statement I promised to send you the other day, but which has been delayed on account of a rush of other matters in the office.

I have been unable to make up the formal claim which I told you that I would furnish you the other day, on account of not having at hand a copy of the bill of lading which I desired to attach to it, but this will follow in due course, unless by reason of your settlement of the claim for loss sustained to the shipment of the Crown Columbia Paper Co., you are already in possession of the data necessary to enable you to pass upon the claim, the [78] statement of which I am enclosing.”—

Mr. HENGSTER.—Pardon me for interrupting you, Mr. Lillick. The letter is not admitted in evidence, your Honor? It is simply offered in evidence.

The COURT.—Yes.

Mr. HENGSTLER.—This is merely a self-serving letter, which has not any place in this case at all.

Mr. LILLICK.—The purpose of the letter is to prove proofs of loss by us under the terms of this policy. It has that purpose, and that purpose alone, except for how it may tie into the testimony that I believe I will be able to present with reference to two consignments of paper upon the vessel. My contention will be that the Hartford Fire Insurance Company, under the terms of this particular policy, paid a loss amounting to \$1158.80, and paid that loss on or about April 24, 1913, and that having before it all of the facts in connection with the loss that ensued in the accident to the steamer, no further proof of the actual facts as to the loss is made necessary so far as we

are concerned, because all of the facts in connection with the loss were so well known to the Insurance Company that they paid the loss under it; and also because I expect to be able to bring out from Mr. Gilliland that this letter followed a conference that he had at my office a day or two before the letter was written. That is the object of the offer.

Mr. HENGSTLER.—I understand that you admit that no proofs of loss were ever made in accordance with the terms of this policy.

Mr. LILLICK.—On the contrary, that is just exactly what my proof to this court will establish, that under the terms of the policy, and under the law, proofs of loss were made in connection with the conduct of the Hartford Fire Insurance Company in [79] connection with a report from their own surveyor, who went out and examined the property.

Mr. HENGSTLER.—What is the date of this letter?

Mr. LILLICK.—June 3, 1913.

Mr. HENGSTLER.—You admit that the policy provides that proof of loss must be made within thirty days after the accident?

Mr. LILLICK.—If that is in the policy I will admit it readily.

Mr. HENGSTLER.—It is in the policy.

Mr. LILLICK.—I think the clause Mr. Hengstler has reference is the following:

“And in case of loss, such loss to be paid thirty days after proof of loss, and proof of interest in

said property, are furnished this company, provided always, and it is hereby further agreed, that if the said insured shall have made any other insurance upon the property aforesaid, prior in date to this policy," etc.

Is that the clause?

Mr. HENGSTLER.—There is a provision that proof of loss must be made within thirty days after the accident.

Mr. LILLICK.—The clause Mr. Hengstler has in mind is this:

"Immediate notice of the occurrence of all losses shall be given to this company by the insured; and within thirty days from the time the same may happen, the said insured shall deliver to said company as particular an account thereof as the nature of the case will admit, stating the causes, if known, the extent thereof, and the nature of the interest of insured in the property, also what other insurance or insurances if any there was on said property at the time of said loss, which statement shall be in writing, signed by the insured, and [80] verified by his or their oath; and so much of said statement as relates to the cause, nature and extent of said loss or damage shall be verified also by the oath of the master of said boat or vessel, or if some other person or persons having immediate charge thereof at the time the same did happen, otherwise this company will not be liable under this policy; and the amount of loss shall be ascertained by the opening of packages, when necessary, by a competent person, and

separating the sound from the damaged portion, this company being liable for the loss on the damaged portion only, which shall be ascertained by appraisement by disinterested persons, or by sale at auction, as this company may prefer."

Mr. HENGSTLER.—Will you admit, Mr. Lillick, that no such proof of loss was made in accordance with the terms which you have just read?

Mr. LILLICK.—No, I will not, Mr. Hengstler. Addressing myself now solely to the objection made by Mr. Hengstler, and following up your request for that decision, I will ask you in a moment for some documents that I believe are in the files of the insurance company that will cover, I think, the point that you wish me to give you an admission upon.

I offer this letter in evidence.

Mr. HENGSTLER.—I object to the offer of this letter in evidence, because it appears on the face of it that it was written long after any proofs of loss should have been made under the terms of the policy. The letter, itself, is not proof of loss in any sense of the word.

The COURT.—The letter will be admitted subject to any objection.

Mr. LILLICK.—The letter continues: [81]

"It was my understanding that formal proof of loss and proof of interest in the property, a statement of which is herewith enclosed, had already been made and from the fact that a representative of your Company went out to the vessel where she was stranded immediately after the loss, I assume

(Testimony of Adam Gilliland.)

that you are in full possession of all of the details with reference to a particular account of the loss, with the causes and extent thereof. The Willamette Navigation Co. had no other insurance upon the property insured under the policy at the time of the loss.

“In my conversation with you, upon Tuesday, I neglected to mention, what you perhaps already know, that the only cargo on board the ‘RUTH’ at the time of the loss was paper in rolls and bundles shipped by the Crown Columbia Paper Co. and Willamette Pulp & Paper Co., consigned to themselves at Portland.

“If there is any further or additional information that you desire, with reference to the claim, the statement of which I am enclosing, kindly let me know and I will see that it is furnished you.

“Yours very truly,

“IRA S. LILLICK,

“Attorney for Willamette Navigation Co.”

(The letter was here marked “Libelant’s Exhibit 1.”)

Q. Mr. Galliland, do you remember that when this letter was received by you there was enclosed with it a statement of the loss of the Willamette Pulp & Paper Co.?

A. No, I do not remember.

Q. I hand you what purports to be an acknowledgment of this letter, Mr. Galliland, and with that before you I ask you do not remember

(Testimony of Adam Gilliland.)

that such a statement of loss was enclosed in the letter?

A. I don't remember it, but this letter would evidently settle the fact that such papers were received. I say here [82] that I have transmitted these papers to Mr. Timberlake.

Mr. LILLICK.—We offer in evidence the letter from Mr. Gilliland, to which his attention has just been called, and ask that it be received and marked “Libelant’s Exhibit 2.”

Mr. HENGSTLER.—I have to object to it on the same grounds, and furthermore on the ground that it appears from this that this was correspondence with reference to a statement of loss and not with reference to a proof of loss. You do not mean to say that the statement you referred to was a proof of loss in any sense of the word, do you, Mr. Lillick?

Mr. LILLICK.—Mr. Hengstler, I would rather not, in answering questions you are asking me, be bound by a legal conclusion as to what they are. My theory of the case, and which the court will have to pass upon, is that in making the claim on the original consignment to the Crown Columbia Pulp & Paper Company, the necessary data were furnished the insurance company, and these letters—with what I think I will be able to obtain from your files—cover exactly what I deem to be, under the law, a sufficient proof of loss.

Mr. HENGSTLER.—Mr. Lillick, to cut all this short, show me your copy of what you claim to be the statement that accompanied that letter.

(Testimony of Adam Gilliland.)

Mr. LILLICK.—I have it here. I asked you for the original, and you say you have not it.

Mr. HENGSTLER.—I didn't say I didn't have it. The company may have it, or I may have it. You didn't ask me to produce any of these things.

Mr. LILLICK.—You misunderstood me. When I asked you for the letter, I asked you for the statement that accompanied it. I ask you now for that statement. [83]

Mr. HENGSTLER.—I will look for it; it may be here, or it may be in my office.

The COURT.—If you have the copy of it there, show it to him and maybe you can use the copy.

Mr. HENGSTLER.—It is just as I thought it was, your Honor, it is a statement of the values of the lost property. That is all it is. It is not a proof of the loss in any sense of the word. I renew my objection on that ground. Also, I want to add to my objection, after hearing that letter, that it contains nothing but assumptions and arguments of counsel, and can have no bearing upon this case. We do not want to be bound by any statements of fact in the letter. In admitting the letter, I understand your Honor does not take the statements made therein as proof of the facts.

Mr. LILLICK.—We offer the letter in evidence as Libellant's Exhibit No. 2. It reads as follows:

(Testimony of Adam Gilliland.)

Libelant's Exhibit No. 2.

(Letterhead of HARTFORD FIRE INSURANCE
COMPANY.)

"San Francisco June 17, 1913.

"Ira S. Lillick, Esq., Attorney,

"608-Kohl Bldg.,

"San Francisco, Calif.

"Dear Sir:

"Acknowledging your favor of the 13th inst. with statement attached thereto referring to claim of Willamette Pulp & Paper Company: We beg to advise you that we have transmitted these papers to Mr. C. S. Timberlake, General Agent of Marine & Transportation Department of this Company at Hartford.

"Yours very truly,

"ADAM GILLILAND.

"Assistant General Agent."

(The letter was marked "Libelant's Exhibit No. 2.")

Q. Mr. Gilliland, I hand you what purports to be a statement [84] of loss of the Willamette Pulp & Paper Co. on the steamer "Ruth," amounting to \$2156.85, and in the absence of the production of the statements that the letter Libelant's Exhibit 1 referred to, I ask you whether or not that is not a copy of the statement that was enclosed in the letter? A. I cannot tell.

Q. Do you remember having seen a statement of similar kind, and with approximately the same figures? A. I remember receiving several state-

(Testimony of Adam Gilliland.)

ments prior to this, but not from you, Mr. Lillick; the facts and figures contained in them I have no recollection of; it might be the same, or it might be very dissimilar; I could not tell.

Mr. LILLICK.—Mr. Hengstler, in answer to the demand I have made upon you, do you find, in looking through your file—

Mr. HENGSTLER.—Mr. Coogan will look through the file. However, if you say that that is the statement that accompanied the letter, I will take your word for it, Mr. Lillick.

Mr. LILLICK.—I am sorry to say, Mr. Hengstler, my own memory is not sufficiently exact to know that. It is my conviction that that is true, but I cannot definitely say that this is an exact copy, with the same figures upon the same page. I do know that on different paper, perhaps, that same statement was attached to my letter.

Mr. HENGSTLER.—To tell you the truth, I don't think it makes much difference, because I do not think the Court will hold that that is a proof of loss.

Mr. LILLICK.—But tied up with other papers I think it will show it.

Mr. HENGSTLER.—As I say, if you say it is the statement, I will take your word for it.

Mr. LILLICK.—I think I will have to testify to the matter, [85] so that the entire situation will be before the Court.

We call for a letter dated September 17, 1913,

(Testimony of Oscar Sutro.)

addressed to the Hartford Fire Insurance Company, and signed by me.

Mr. HENGSTLER.—With the consent of counsel, and subject to your Honor's approval, we will call Mr. Oscar Sutro to the stand.

Mr. LILLICK.—I understand that Mr. Sutro will identify the receipts you have. He is not my witness, your Honor, but solely in order to expedite the hearing, I will ask Mr. Sutro certain questions about the receipts which will have to be identified by him. Shall I put Mr. Sutro on the stand, or will you?

Mr. HENGSTLER.—Just as you please.

Mr. LILLICK.—I would rather have you put him on, because it is a part of your defense.

Mr. HENGSTLER.—All right, I will call him.

Testimony of Oscar Sutro, for Respondent.

OSCAR SUTRO, called for the respondent (out of order), sworn.

Mr. HENGSTLER.—Q. Mr. Sutro, you are an attorney at law, practicing here in this city and county? A. Yes.

Q. You were, in April, 1913, the attorney for the Willamette Navigation Company, were you not? A. Yes.

Q. You made a settlement between the Willamette Navigation Company and the Hartford Fire Insurance Company at that time, did you not?

A. Yes.

(Testimony of Oscar Sutro.)

Q. I will show you a document here and I will ask you what this document is, I will ask you to describe it to the court.

A. It is a receipt signed by the Willamette Navigation Company by myself; the signature is in my handwriting. [86]

Mr. HENGSTLER.—I offer this in evidence, Mr. Lillick.

Mr. LILLICK.—May I see it, Mr. Hengstler? No objection.

Mr. HENGSTLER.—The document reads as follows:

Respondent's Exhibit "A."

**"MARINE AND TRANSPORTATION
DEPARTMENT.**

**"THE HARTFORD FIRE INSURANCE COM-
PANY,
"HARTFORD, CONN.**

"April 24th, 1913.

"RECEIVED of The Hartford Fire Insurance Company, through Palache & Hewett, Genl. Agents at San Francisco, the sum of Eleven Hundred Fifty Eight & 80/100 Dollars, being in full satisfaction and compromise settlement of all claims and demands against the said Company for loss or damage by ~~Fire, Theft, Collision~~ Stranding Str. "Ruth" which occurred on the 11th day of January,

(Testimony of Oscar Sutro.)

1913 to the ~~Automobile~~ property described under Cargo Policy No. 304 of said Company.

“\$1158.80.

“WILLAMETTE NAVIGATION COMPANY,

“By OSCAR SUTRO.”

(The document was marked Respondent's Exhibit “A.”)

Mr. Sutro, at the time when this receipt was given, you understood that it did what it states on its face, namely, that it settled all the claims of the libelant in this case as against the respondent, did you not? A. Yes.

Mr. HENGSTLER.—That is all.

Cross-examination.

Mr. LILLICK.—Mr. Hengstler, we ask you to produce the proof of claim made out by Mr. Sutro, the proof of loss made out by Mr. Sutro, a few days before that receipt was signed.

Mr. HENGSTLER.—Proof of claim?

Mr. LILLICK.—Proof of loss.

Mr. HENGSTLER.—I don't think I have such a document.

Mr. LILLICK.—Isn't it attached to the file from which you took the receipt?

Mr. HENGSTLER.—I will see. Just look here, Mr. Lillick. [87] Is this what you mean?

Mr. LILLICK.—No. The one I wish is the one upon which the payment of \$1158.80 was made.

Mr. HENGSTLER.—I have not any such proof of loss, Mr. Lillick.

(Testimony of Oscar Sutro.)

Mr. LILLICK.—I call upon the respondent for the proof of loss under which the payment of \$1158.80 was made to the Willamette Navigation Company.

Mr. HENGSTLER.—I shall be very glad to ask the Hartford Fire Insurance Company to obtain that document if they have it in their office. I have not it. Mr. Lillick, you have not given me any notice to produce any papers here at all, have you?

Mr. LILLICK.—No, Mr. Hengstler, I have not, but then, I assume you have these papers in your file.

Mr. HENGSTLER.—I will give you anything you want that I can get.

Mr. LILLICK.—I am sure of that. I am not attempting to call on you for something you have not got. I personally prepared the proof, as I understand it, under which the payment of \$1158.80 was paid.

Q. Mr. Sutro, have you a copy of the proof of loss which was made at the time, or about the time, that the \$1158.80 was paid you?

A. I have a copy of a material portion of the proof of loss; I have not the entire proof of loss. I think this is a paper prepared by you. I cannot say that that was the proof that was used, but I can say that that is the paper that you prepared, and I think it was used.

Q. I call your attention to the ink word “used”; is that your writing?

(Testimony of Oscar Sutro.)

A. No, that is not my writing, I think it is yours.

Q. I think it is, too.

A. I know it is not my writing. I think it is Mr. Lillick's writing. [88]

Q. And is it your recollection that that is a part of the proof that was made?

A. My recollection is that that was the rider, the substantial portion of the proof of loss annexed to the usual printed form and used. I base that statement on the word "used," and on the fact that I found it in my file. Here is another copy of it if you care to use it.

Mr. HENGSTLER.—This is your writing, Mr. Lillick, isn't it?

Mr. LILLICK.—Yes, Mr. Hengstler.

A. (Continuing.) Of course, that cites the authority that is on there, I am quite sure that was not a part of the proof of loss; it was only the typewriting, and not any of the ink or pencil writing.

Mr. LILLICK.—We offer this in evidence, except for the citation upon the top, and the word "used," and I will read into the record:

Libelant's Exhibit No. 3.

"The cash value of the property belonging to and owned by the Crown-Columbia Paper Company at the time of loss, the loss and damage on the same for which claim is hereby made, the total insurance upon said property, the total claim for

(Testimony of Oscar Sutro.)

loss under the entire insurance on said property and the insurance and claim under this policy upon said property belonging to and owned by the Crown-Columbia Paper Company is.....\$1158.80.

“And the insured hereby claims and agrees to accept from the Hartford Fire Insurance Company by reason of said loss and damage to said property belonging to and owned by said Crown-Columbia Paper Company the sum of \$1158.80, in full satisfaction of all liability under said policy for said loss and damage to said property belonging to and owned by said Crown-Columbia Paper Company. [89]

“The amount of sound value herein stated does not exceed the cash market value at the time of the said loss of the said property so damaged and so destroyed. The said property belonging to and owned by said Crown-Columbia Paper Company on which this claim for loss is made belonged to and was owned by said Crown-Columbia Paper Company under an agreement with the Willamette Navigation Company, under which the latter Company assumed responsibility for marine perils, and under which said last mentioned company has paid said Crown-Columbia Paper Company.”

(The document was marked “Libelant’s Exhibit No. 3.”)

Q. Mr. Sutro, when you signed the printed proof of loss to which this rider was attached, do you remember whether it antedated the payment to you of the \$1158.80?

(Testimony of Oscar Sutro.)

A. What is the date, please, of that receipt?

Q. April 24, 1913.

A. It did not. If I correctly understood your question, the proof of loss was filed after the payment was made, assuming that the payment was made at the date of the receipt, which I have no independent recollection of.

The COURT.—Maybe I didn't catch that question. Read it.

(Question read by the reporter.)

A. (Continuing.) I should say to you, Mr. Lillick, that I did not sign the proof of loss. I am quite clear in my recollection about that. With the aid of these papers, and such recollection as I have, I know that the proof of loss as finally signed was delivered more than a month after the date of that receipt; in other words, the proof of loss followed the payment.

Mr. LILLICK.—Q. Can you give any explanation as to how or why the insurance company paid you the \$1158.80 before you made out a proof of loss? A. Yes, I think I can. [90]

Q. Will you please do so?

A. The relations between the Hartford Fire Insurance Co. and the Willamette Navigation Company, the insured, were such that the strict formalities were not insisted upon. This loss was the subject of a good deal of discussion. There was a good deal of question by the Hartford Fire Insurance Company whether they were liable on it. They finally became persuaded that they should pay

(Testimony of Oscar Sutro.)

it. We were quite impatient about it, there was a good deal of delay. As soon as the fact that the payment would be made by the Hartford to the Willamette Navigation Company was settled, as soon as they had come to the conclusion that they would make the payment, they made it, and they allowed the formality of proof of loss to follow. I remember that very distinctly. It was also due to the fact that the proof of loss was the subject of some discussion and some delay—the form of it.

Q. Did they accept the proof of loss, which as to the rider upon it is Libelant's Exhibit No. 3, with the specific statement in that proof of loss that it covered only the consignment of paper upon the "Ruth" at the time of this accident which belonged to the Crown-Columbia Paper Co.?

A. I don't know. If that is the paper they accepted, I suppose it speaks for itself, Mr. Lillick; I think that is the paper that was used, and I base that on the fact that the word "used" is written there, and also that the proof of loss, as finally furnished them, was prepared by you, and I think that is your office typewriting and your writing. I think that paper came from your office.

Q. I know that is my writing, and I think it did come from my office. In the statement that you made to Mr. Hengstler, that this receipt covered the entire settlement of all claims [91] and demands against the Hartford for the stranding of the steamer "Ruth" under this policy, did you, at the time that this receipt was made out, approxi-

(Testimony of Oscar Sutro.)

mately a month, as you say, before the proof was made, have before you all of the facts with reference to the shipment of paper upon the "Ruth" at that time, which had been damaged to the extent of some \$5600?

A. I think so, Mr. Lillick; I think the whole case was before us. It was the subject of a good deal of discussion, as you will remember.

Q. Then when the proof of loss was subsequently made out covering only this \$1158.80, was it your understanding that it covered only a part of the shipment, or all of it?

A. I am not sure that I understand your question. I knew that the paper covered by that insurance was not all the paper that was on the vessel, if that is what you mean.

Q. Yes.

A. I don't think that is what you mean to ask me, is it? I know there was other paper on the vessel than the paper covered by that insurance.

The COURT.—Q. When you say "covered by that insurance," what do you mean?

A. Well, that receipt is for \$1158.80.

Q. Yes, I mean covered by that receipt. Do you mean covered by that receipt?

A. Covered by that receipt, yes, that is what I mean.

Mr. LILLICK.—Q. You know something of the facts with reference to the accident, do you not, Mr. Sutro?

A. Nothing further than that the vessel was

(Testimony of Oscar Sutro.)

stranded, and that the paper on the vessel belonging to two different companies was damaged.

Q. And the two different companies, one was the Crown-Columbia Paper Company, wasn't it?

A. Yes.

Q. And that was damaged to the extent of \$1158.80? A. Yes. [92]

Q. There was another consignment belonging to the Willamette Pulp & Paper Company, wasn't there? A. Yes.

Q. And that was damaged to the extent of \$5621.-85? A. Yes.

Q. May I put it this way, Mr. Sutro: In executing the receipt which you did upon April 24, 1913, for the payment to the Willamette Navigation Company of that sum, the amount in question is exactly the amount of the shipment belonging to the Crown-Columbia Paper Company?

A. It was the damage to the Crown-Columbia Paper Company which the Hartford Fire Insurance Company paid to the Willamette Navigation Company.

Q. And that is the amount that you understood you were being paid, isn't it?

A. That was the amount that we were being paid. The Willamette Navigation Company paid the Crown-Columbia Paper Company the amount of that loss and the Hartford Fire Insurance Company reimbursed the Willamette Navigation Company for that payment. I am very clear about that. The paper is evidence of it.

(Testimony of Oscar Sutro.)

Q. And that is all it was the evidence of?

A. That is what it was.

Q. Is it not also the fact that in working out the subsequent proof of loss that was drawn by me and sent to the Hartford, we particularly excepted from that shipment belonging to the Willamette Pulp & Paper Company?

A. Well, I think, Mr. Lillick, that the paper is probably the best evidence of that. You know what the discussions between us were at the time. I would rather not construe the paper.

Q. However, it does not cover any part of the shipment belonging to the Willamette Pulp & Paper Company, does it, Mr. Sutro?

A. It is a proof of loss and was intended to be for the paper which had been shipped by the Crown-Columbia Paper Company, [93] which was damaged, and for which the Willamette Navigation Company paid and for which the Willamette Navigation Company was reimbursed by the Hartford Fire Insurance Company. That was very clear amongst all of us.

The COURT.—Q. What is the difference in the status, if any, between this shipment and the other?

A. There was a very material difference, as I recollect the circumstances. The Crown-Columbia Paper Company was a competitor concern of the Willamette Pulp & Paper Company; the Willamette Pulp & Paper Company controlled the Willamette Navigation Company. The Willamette Navigation Company was practically a subsidiary.

(Testimony of Oscar Sutro.)

The Crown-Columbia Paper Company's shipments were made under bills of lading, and some of the Willamette Pulp & Paper Company's shipments were made under bills of lading and some were not. At the inception of the business between the Crown-Columbia and the Navigation Company, the Crown-Columbia having been advised that the Navigation Company would not issue insured bills of lading, if that is the correct expression, declined to make its shipments unless the Navigation Company would undertake to protect the Crown-Columbia Paper Co. in case of loss. That undertaking, apparently, was expressed in correspondence. The Crown-Columbia Paper Company virtually had what the Willamette Navigation Company recognized as an insured contract, and the Willamette Pulp & Paper Company did not have it.

Q. Why was this claim pressed to a settlement and a receipt given apparently in full for all claims while a much larger claim was held in abeyance?

A. Because the Willamette Navigation Company considered itself liable to the Crown-Columbia Company for the loss to the Crown Columbia Paper [94] Company paper, and it did not consider itself liable for the Willamette Pulp & Paper Company for the loss to the Willamette Pulp & Paper Company's paper; the Navigation Company was insured by the Hartford Fire Insurance Company. Whether it had a sound or an unsustainable claim against the Hartford Fire Insurance Company, the Navigation Company did satisfy the Hartford Fire Insur-

(Testimony of Oscar Sutro.)

ance Company that as it, the Navigation Company, had paid the Crown-Columbia Paper Company, the Hartford Fire Insurance Company should re-pay the Navigation Company.

Mr. HENGSTLER.—Q. Did it admit a legal liability at the time, or merely a moral liability?

A. Did who admit it?

Q. The Hartford Fire Insurance Company.

A. The Hartford Fire Insurance Company disputed its liability; what finally satisfied the Hartford Fire Insurance Company that as matter of either legal principle or business policy it should pay the claim was the exhibition to the Hartford Fire Insurance Company of a letter that the Crown-Columbia Company had shipped only on condition that the Navigation Company would pay any losses.

Q. This was by reason of an outside document, and not by reason of the policy?

A. By an understanding outside the bills of lading. I do not know if I have made the difference clear between the two companies.

The COURT.—You have made the difference clear as between the outsiders and the company, but it is not quite clear yet to me why a receipt should be given in full and the Navigation Company still hold a claim nearly five times the amount; was that under discussion between the companies at all?

A. Yes; the Navigation Company considered that it had a claim—

Q. And pressing that claim?

A. For this sum? [95]

(Testimony of Oscar Sutro.)

Q. For \$5000-odd.

A. Oh, no, it considered that it had a claim for the loss to the Crown-Columbia Company's paper, and that was paid. The Navigation Company did not own the Willamette, Pulp & Paper Company's paper, that was owned by the shipper, the paper company, the Willamette Pulp & Paper Company. The Navigation Company would have no claim against its insurer if it, itself, was not liable to its shipper.

Mr. LILLICK.—Pardon me, Mr. Sutro, I take it that that is your legal understanding of it.

A. (Continuing) No, that is my understanding of the difference in the status between the two companies.

The COURT.—Aren't you suing under the same policy under which the other sum was paid?

Mr. LILLICK.—Yes, your Honor.

The COURT.—I still cannot get it into my head why the receipt for settlement in full of all claims for the sinking of the "Ruth" should be given when you only had in mind about \$1000, and in the background over \$5000.

A. (Continuing.) Because that was the only money that the Navigation Company considered itself legally liable for.

Q. Was this a settlement of a disputed liability, a liability disputed *in toto*, by which the insurance company paid \$1000 because, in good faith, it ought to pay that, or in good morals, rather, because the company had to pay it out of something else? Was that the basis of that whole sum of \$1100-odd?

(Testimony of Oscar Sutro.)

A. I suppose that is what this lawsuit is about; but to answer your question as best I can, I don't remember that the Navigation Company ever asserted its claim against the Hartford Fire Insurance Company for the \$5000 amount.

Q. At that time?

A. At any time, outside of this suit. [96]

Q. If they were not asserting it, they would not be here today.

A. The Standard Fire & Marine is asserting it by right of subrogation, which they have a right to do. The Standard Fire & Marine had insured the Willamette Pulp & Paper Company, and that company paid the loss; if the shipper could recover from the Navigation Company, and the navigation company can recover from the Hartford Fire, then, of course, the Standard Marine, by right of subrogation, could recover from the Hartford Fire Insurance Company.

Q. What I am trying to get at is this: If this claim had been presented before the receipt was signed, we would know just what we were operating on. The proof of loss was, as you say, made long after—

A. It was made a month after.

Q. It was made a month after. If the whole thing was adjusted and the insurance company considered that that whole thing was adjusted by the taking of this receipt, I could well understand why they would not scrutinize at all carefully the proof of loss.

A. I do not believe that the Willamette Naviga-

(Testimony of Oscar Sutro.)

tion Company asserted any claim against the Hartford Fire Insurance Company prior to the payment of that sum for the loss to the Willamette Pulp & Paper Company's paper. Am I not correct in that?

Mr. LILLICK.—Q. I am not sure about the dates, Mr. Sutro; what I have in my own mind is your own connection with the Willamette Navigation Company—not what you are very truthfully stating as to what you believed at the time; I want to refresh your recollection, Mr. Sutro.

A. I remember it very well. You and I discussed it.

Q. I want to call to your attention the minutes of the Willamette Navigation Company, which just about that time had [97] in them a statement as to what the facts were. I ask you what this book is, Mr. Sutro?

A. Of course, I know it is the minute book, but these minutes, Mr. Lillick, I am inclined to think were prepared—were they prepared in San Francisco or in Portland? They were prepared in Portland. I am only sort of ancillary counsel for the Willamette Navigation Company; the principal legal work for that concern was done by Portland attorneys.

Q. I call your attention to an item in the minutes of the Willamette Navigation Company, dated Portland, Oregon, February 15, 1913, as follows:

“The Secretary reported the loss of the steamer “Ruth,” which had sunk in the Willamette River

(Testimony of Oscar Sutro.)

on the 11th day of January, the cargo alone being insured against marine loss, the officers having been released from all liability by the United States Inspectors, and the loss considered by them as one of the risks of navigation. On motion it was unanimously resolved that the officers of said steamer "Ruth" be and they hereby are exonerated and relieved of all liability."

A. You want to call my attention to the fact that this cargo was insured against marine loss?

Q. Yes. A. Why, of course it was.

Q. Also to this entry:

"April 18, 1913. The Secretary stated there was some question regarding the collection of insurance under Hartford Fire Insurance Company's policy covering marine loss. The matter was ordered turned over to the corporation's attorney, Mr. R. A. Leiter, for investigation."

That was on April 18, 1913; that was prior to your receipt of the money, wasn't it?

A. Yes. [98]

Q. I call your attention to the minutes of the Board of Directors, May 21, 1913:

"Balance of loss had not yet been liquidated." Calling your attention to the date, May 21, 1913, that is at least almost a month after the receipt which Mr. Hengstler has put in evidence. So that if I am correct, the directors of the company believed on May 21, 1913, that they still had a balance of the loss on this policy still to be collected?

A. You mean against the Hartford Fire?

(Testimony of Oscar Sutro.)

Q. Against the Hartford Fire.

A. Are you asking me to state what the directors believed?

Q. Isn't this the situation, as shown by the minutes?

A. Well, I am not to guess at what they believed, but if I were to guess I think it would be a pretty accurate one.

Q. As late as May 21, 1913, the Board of Directors, at a meeting—

Mr. HENGSTLER.—I do not want this admitted as a fact. There is no proof of any such fact.

Mr. LILLICK. This is my question:

Q. (Continuing.) Admitted, as late as that date, by the entry in their minutes, the statement: "The Secretary also stated that the Hartford Fire Insurance Company had, on May 8, remitted in full for the amount of the claim made on us by the Crown-Columbia Paper Company, covering their loss, balance of loss had not yet been liquidated." Would you say that when those minutes were read at the next ensuing meeting, on June 13, 1913, they were read and approved?

Mr. HENGSTLER.—How can he know that?

A. I don't know anything about the minutes. I am sure those minutes are correct—I mean, I am sure they are carefully kept. [99]

Mr. LILLICK.—Q. Mr. Sutro, going back to this receipt, there is no doubt in your own mind, is there, that when the proof of loss, which was furnished a month after the receipt of the money, that

(Testimony of Oscar Sutro.)

in that proof of loss no reference was made to the Willamette Pulp & Paper Company's paper?

Mr. HENGSTLER.—That receipt speaks for itself.

Mr. LILLICK.—Exactly, but this is leading up to another question.

A. I am not quite sure there was no reference in any other part of the proof of loss than that which you have introduced in evidence here, and I do not see any in there, either; I think it is safe to say there was none.

Q. Was any exception taken to the form of that proof of loss when it was sent by you to the Hartford Fire Insurance Company?

A. No; on the contrary, it superseded a form which they had tendered, and which was not acceptable to you. They accepted your form.

Q. When the receipt for the check for \$1158.80 was signed by you, did you sign it at that time with an understanding that it should be followed by a formal proof of loss?

A. I cannot answer that question, Mr. Lillick, it is too long ago. I am sure that if the subject were mentioned, I would assume, of course, that a proof of loss would have to be filed. We often file proofs of loss on claims after the claims are paid. With fire companies, that is a very common practice. The assured is often in a hurry for his money, and the companies often pay it before the proof of loss is filed. I do not think the subject was mentioned. It would be taken as matter of

(Testimony of Oscar Sutro.)

course that we would file a proof of loss if one had not been filed.

Q. You say it was taken as a matter of course?

A. I would take [100] it as a matter of course when I signed the receipt that in due season the proof of loss would be filed. It may be that the proof of loss which the company had asked us to sign, and which was not acceptable to you, had already been tendered to us.

Q. Is not that the fact, Mr. Sutro? Of course, it is many, many years ago.

A. I think I can verify that for you.

Q. Yes, I wish you would try to verify that.

Mr. HENGSTLER.—Mr. Lillick has enlightened me on that point, the point that you asked about, Mr. Lillick—

Mr. LILLICK.—Let us first finish with Mr. Sutro, and then we will go into the other matter.

A. (Continuing.) I find a letter on April 25, "The proof and proof of loss have been forwarded to Oregon City office with the request that the latter be executed."

My recollection now is that on the day that the receipt was signed and the money paid, Mr. Barclay, of the Hartford Fire Insurance Company, asked me to sign a proof of loss. That proof of loss was sent to Oregon City and was executed. It had been prepared by the Hartford Fire Insurance Company. It subsequently came to your attention, you representing the Standard Fire & Marine. It was deemed unsatisfactory by you, representing the

(Testimony of Oscar Sutro.)

Standard Fire & Marine, and the proof of loss was re-formed to conform to that form there. That is the reason why in this case the proof of loss was a month later than the actual payment of the money.

I remember that with the check Mr. Barclay on the same day gave me a proof of loss, which we actually sent on and had signed. You had not seen it. Subsequently, it was shown to you, before the execution was completed, and it was changed.

Q. And changed by using the document that is now in evidence, [101] by the rider attached to the ordinary form of their proof of loss?

A. Yes, I am sure that that is the one that was used.

Mr. LILLICK.—That is all.

Redirect Examination.

Mr. HENGSTLER.—Q. Mr. Sutro, with reference to that receipt on the 24th of April, as I understand it from your testimony, the situation was this: You had, for the libelant, two claims against the insurance company, and there was a controversy about those claims, the insurance company denying liability under each one of them, but they finally agreed to pay the smaller one, with the understanding that that should settle the whole indebtedness? Is not that the situation?

Mr. LILLICK.—That is objected to as being leading and suggestive.

The COURT.—Objection overruled.

A. I am not sure that that is a correct statement of the situation, Doctor; I am not at all sure that

(Testimony of Oscar Sutro.)

the Willamette Navigation Company ever made a claim against the Hartford Fire Insurance Company prior to the date of this payment for more than the damage to the paper of the Crown-Columbia. As I remember the situation, the Willamette Navigation Company considered itself liable to the Crown-Columbia Paper Co. for the loss of that paper, and we had either paid that loss or knew that we were going to pay it. I am not sure that we went any further in our claim against the Hartford than the collection of the amount which we either already had paid the Crown-Columbia, or which we knew we were going to pay them. Your question began with the statement that we made two claims against the Hartford—I don't think we ever did at that time.

The COURT.—Q. Everybody knew, didn't they, that a much [102] greater damage had occurred than this amount of \$1100?

A. Yes, but the damage was to the paper of the Willamette Pulp & Paper Company.

Q. But if one were covered by the policy, the other would be?

A. Well, not necessarily, as I understood it; Mr. Lillick disagreed with me on that at that time. The policy, according to the contention of the Hartford Fire Insurance Company, covered neither claim, because our bill of lading did not protect our shippers. That was the contention of the Hartford Fire Insurance Company. It was only because we had a special agreement with the Crown-Columbia

(Testimony of Adam Gilliland.)

that, regardless of the terms of the bill of lading, we, as the ship owners, would pay their loss, it was because we had that special agreement to indemnify the Crown-Columbia that we persuaded the Hartford Fire Insurance Company that the portion of the loss which we had made good to the Crown-Columbia should be reimbursed to us. So far as I know, we never did pay the Willamette Pulp & Paper Company anything, and, consequently, we could not claim against the Hartford Fire Insurance Company.

Mr. HENGSTLER.—That is all.

Mr. LILLICK.—That is all, Mr. Sutro.

Testimony of Adam Gilliland, for Libelant (Recalled).

ADAM GILLILAND, recalled.

Mr. LILLICK.—Q. I think we interrupted the testimony of Mr. Gilliland at the time I had just obtained from Mr. Hengstler the letter dated September 17, 1913, addressed to the Hartford Fire Insurance Company; I ask you whether you remember having received that letter from me, Mr. Gilliland.

A. No, I do not.

Mr. LILLICK.—Will you stipulate, Mr. Hengstler, that the [103] letter was received by the company, according to the stamp, September 17, 1913, at four o'clock in the afternoon?

Mr. HENGSTLER.—That it was received by the Hartford Fire Insurance Company at that time?

Mr. LILLICK.—Yes.

Mr. HENGSTLER.—I stipulate to that.

Mr. LILLICK.—We offer the letter in evidence and ask that it be marked “Libelant’s Exhibit 4.” It reads as follows:

Libelant’s Exhibit No. 4.

(Letterhead of IRA S. LILLICK.)

“San Francisco Sept. 17, 1913.

“Hartford Fire Insurance Co.,

“430 California St.,

“San Francisco.

“Gentlemen:

“Referring to my letter to your Mr. Adam Gilliland, assistant general agent, under date of June 13, 1913, and the statement therein made that as soon as I obtained the bills of lading for the paper mentioned in the claim of the Willamette Pulp & Paper Co. against the Willamette Navigation Co. for its shipment on the steamer ‘Ruth’ I would forward them to you, these bills of lading have just been received and I am forwarding you herewith copies thereof. The originals are subject to your inspection, if you so desire.

“As stated in my letter above referred to, I believe that you are in full possession of all the details with reference to a particular account of the loss, with causes and extent thereof, as well as the nature of the interest of the Willamette Navigation Co. in the property, inasmuch as you have paid the Willamette Navigation Co., under your policy No. 304, the damage suffered by the loss of the paper

of the Crown Columbia Paper Co. The statement of the loss of the Willamette Pulp & Paper Co., (claim [104] for which has been made against the Willamette Navigation Co.) was sent you in my letter under date of June 13, 1913, and this claim for \$5621.85 is of exactly the same character as that of the Crown Columbia Paper Co., so that you are undoubtedly in possession of all of the information necessary to enable you to pass upon it. Under the terms of your policy, loss is agreed to be paid within thirty days after proof thereof, and we shall be glad to receive payment of this loss within thirty days from the date hereof.

“I repeat our offer to furnish you with any further or additional information that you desire with reference to this claim, as well as any further form of proof of loss.

“Yours very truly,

“IRA S. LILLICK,

“Atty for Willamette Navigation Co.”

(The document was marked “Libelant’s Exhibit 4.”)

Mr. HENGSTLER.—What is the object for which you offer this letter, Mr. Lillick?

Mr. LILLICK.—A second link in the chain passing on to the Hartford Fire Insurance Company any information that it might desire or request from us with reference to further proofs of loss, and the statement upon my part, then representing the Navigation Company, that we would furnish the insurance company with anything else that they might desire in connection with the facts.

Mr. Gilliland had asked me for copies of the bills of lading, as I remember it—no, I am wrong about that; I had offered them as soon as I could obtain them, and I had to send North to furnish them. It is tying in to this first letter.

Mr. HENGSTLER.—I object to it on the same grounds. It is not within the 30 days; it is not proof of loss in any sense of the word. I understand that, anyhow, we will not be bound [105] by any statements of fact which are made in these letters.

Mr. LILLICK.—Q. Mr. Gilliland, I refer in that letter to certain bills of lading; have you no recollection of having received those?

A. No, I have not.

Mr. LILLICK.—Mr. Hengstler, if you have them in your file, will you let me have them, please?

Mr. HENGSTLER.—The Bills of Lading?

Mr. LILLICK.—Yes, the bills of lading referred to in the letter.

Mr. HENGSTLER.—I could not tell you where the bills of lading are with reference to this shipment.

Mr. LILLICK.—They should be attached to the original of this letter of September 17, 1913.

Mr. HENGSTLER.—I have bills of lading here.

The COURT.—Have you the originals?

Mr. LILLICK.—They should be at the office. I have a copy here, your Honor. The original of them was never asked for. The defense, as I understand it, with reference to the common carrier part of it, is based in large part upon certain provisions of the

bill of lading. Mr. Hengstler and I can agree, I think, on another copy if they have not the ones I thought would be in their file ready available.

Mr. HENGSTLER.—I have bills of lading here, but I cannot tell whether I have the bills of lading that cover this shipment.

The COURT.—I only have in mind the statement in the letter that the originals were open to their inspection.

Mr. LILLICK.—Yes, but they were never asked for, your Honor. They were in the office subject to their inspection. These others furnished—they were simply copies.

Mr. COOGAN.—I think these are the bills, here.
[106]

Mr. LILLICK.—They are quite as important for you as they are for me.

Mr. HENGSTLER.—There is a set of bills of lading here, but I cannot tell you whether they cover this shipment, or not.

Mr. LILLICK.—We can check them in a minute. This is for 43 rolls, San Francisco “Examiner”—

Mr. HENGSTLER.—No, this is Los Angeles “Examiner.”

Mr. LILLICK.—There were 26 for the Los Angeles “Examiner.”

The COURT.—Is it material, as long as the shipment is paper, if we get one bill of lading that carries the form? Aren't they all the same form?

Mr. LILLICK.—Yes, your Honor. There is no

reason in the world why one cannot be deemed to be the form for all.

The COURT.—I think so. If there is one admitted, you can get the terms out of that particular one. It can be stipulated that that is the form under which all of this shipment was made.

Mr. LILLICK.—Exactly, your Honor.

Mr. HENGSTLER.—We will give you this one.

Mr. LILLICK.—The one that is being offered as an exemplar of all is for 83 rolls, 67", for the Times-Mirror Co. We offer this in evidence. As I understand it, this is by stipulation deemed to be a copy of one that is in the same form as all of the other bills of lading that covered the shipment of the Willamette Pulp & Paper Company on the steamer "Ruth" when this accident happened.

Mr. HENGSTLER.—Yes.

The COURT.—And will the stipulation go to the extent that it is the same form that covered the Crown-Columbia paper?

Mr. LILLICK.—Yes, your Honor, so far as I am concerned.

Mr. HENGSTLER.—I don't know that, but I don't think it [107] makes any difference in this at all.

The COURT.—Maybe not. If it did, I would like to have it settled now.

Mr. HENGSTLER.—If I can find any Crown-Columbia bills of lading, I will hand them to your Honor.

Mr. LILLICK.—It will be appended to your proof of loss. I think you can find it in a moment, can't you? Here is Crown-Columbia Paper Company; I don't know what is in this, but I am perfectly willing to stipulate that you can use this.

Mr. HENGSTLER.—I think that is a shipping order. I can't tell whether that is a bill of lading, or not. I don't want to offer it in evidence, your Honor, but I shall be very glad to let your Honor see what it amounts to.

Mr. LILLICK.—That came from your files. I am willing to stipulate that that was the document under which the Crown-Columbia Paper Company shipment was sent.

Mr. HENGSTLER.—I could not stipulate to it, because I don't know anything about it. I am not interested in the Crown-Columbia Paper Company's shipment.

Mr. LILLICK.—At any rate, the document just handed to the Court was a document appended to the proof of loss made on the Crown-Columbia Paper Company's loss.

Mr. HENGSTLER.—I could not tell you that, either. I don't know whether it was attached to any proof of loss, or not.

The COURT.—Without too careful an examination, these seem to be identical.

Mr. LILLICK.—Then will you mark the second one for identification, at least. The first one is in evidence. The second can be marked for identification.

(The documents were here marked, respectively, "Libelant's [108] Exhibit 5" (in evidence), and "Libelant's Exhibit 6" (for identification).

(Exhibit 5 reads as follows:)

Libelant's Exhibit No. 5.

"Uniform Bill of Lading — Standard Form of
Straight Bill of Lading Approved by the Inter-
state Commerce Commission by Order No. 787.

WILLAMETTE

"**THE OREGON RAILROAD AND NAVIGATION COMPANY.**

Shippers No. —

**STRAIGHT BILL OF LADING—ORIGINAL—
NOT NEGOTIABLE.**

Agents No. —

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading, at OREGON CITY, OREGON, Jan. 11, 193, from Willamette Pulp and Paper Company the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed here-

under shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The Rate of Freight from — to — is in Cents per 100 Lbs.

If Times 1st : If 1st Class : If 2d Class : If 3d Class : If 4th Class :

:	:	:	:	:
:	:	:	:	:

[109]

If 5th Class : If A Class : If B Class : If C Class : If D Class : If E Class

:	:	:	:	:
:	:	:	:	:

If Commodity :

:
:

(Mail Address—Not for purpose of Delivery.)

Consigned to WILLAMETTE PULP AND PAPER COMPANY.

Destination—San Pedro, State of Calif., County of

——. Route N. CO. and S. F. & P. S. S. CO.

Car Initial ——. Car No. ——.

No. Packages.	Description of Articles and Special Marks.	Weight (Subject to Correction).	Class or Check. Rate. Column.
------------------	---	---------------------------------------	----------------------------------

No. Rolls	SIZE	For Printing Paper
-----------	------	--------------------

or

83

67"

"

"

TIMES-MIRROR CO.

Prepay to Portland.

If charges are to be prepaid, write or stamp here,
 "To be prepaid." ———.

Received \$—— to apply in prepayment of the
 charges on the property described hereon.

—————,
 Agent or Cashier.

Per ———.

(The signature here acknowledges only the
 amount prepaid.)

Charles advanced: \$——.

WILLAMETTE PULP & PAPER COM-
 PANY, Shipper.

Per M. G. NOBEL.

A. B. FORD, Purser, Agent.

Per Str. "Ruth."

(This Bill of Lading is to be signed by the Ship-
 per and Agent of the Carrier issuing same.)"

(The reverse side of bill of lading contains the
 following:) [110]

"CONDITIONS.

Sec. 1. The carrier or party in possession of any
 of the property herein described shall be liable for
 any loss thereof or damage thereto, except as here-
 inafter provided.

No carrier or party in possession of any of the
 property herein described shall be liable for any
 loss thereof or damage thereto or delay caused by
 the act of God, the public enemy, quarantine, the
 authority of law, or the act or default of the shipper

or owner, or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

[111]

Sec. 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only

as agent with respect to the portion of the route beyond its own line.

No Carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Sec. 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement indorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower

value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Claims for loss, damage, or delay must be made in writing to [112] the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance, that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

Sec. 4. All property shall be subject to necessary coooperation and baling at owners cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and that if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator

charges in addition to all other charges hereunder.

Sec. 5. Property not removed by the party entitled to receive it within forty-eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a [113] public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty-eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are

attached to and after they are detached from trains.

Sec. 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification of tariffs, unless a special agreement to do so and a stipulated value of the articles are indorsed hereon.

Sec. 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Sec. 8. The owner or consignee shall pay the freight and [114] all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Sec. 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in possession

(Testimony of Adam Gilliland.)

shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term 'water carriage' in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Sec. 10. Any alteration, addition or erasure in this bill of lading which shall be made without an indorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect, and this bill of lading shall be [115] enforceable according to its original tenor."

Q. Mr. Gilliland, do you personally know anything about the facts in the case with reference to the accident to the "Ruth"?

A. My recollection of the incident is not particularly clear, but, in general, I understand that this steamer "Ruth" loaded with this paper either sprang a leak and went ashore, or else stranded and

(Testimony of Adam Gilliland.)

sunk, and the paper was damaged. That is about all I ever heard about it.

Mr. HENGSTLER.—I move that that be stricken out, your Honor, as hearsay and not responsive.

The COURT.—Let it go out, if he knows nothing about it except what he has heard.

Mr. LILLICK.—Q. You had in Portland a surveyor by the name of Honeyman, representing the Hartford Fire Insurance Company, did you not?

A. We employed a man named Honeyman; I never knew that he was a permanent employee.

Q. For this particular loss, however, and in making the survey on the paper this man Honeyman was appointed, was he not, to represent you?

A. My recollection is Mr. Honeyman acted.

Q. You had a report from Mr. Honeyman at the time of the accident, did you not, giving his statement of his having gone out to the wreck and having gone over it?

A. I do not know. May I offer an explanation here? In regard to these preliminary proceedings, they did not come particularly within my province; we had a man who looked after the Marine Department, and so these things might have come in and I not see them. I don't remember having seen a report from Honeyman. My connection with the matter came in closer with it when the settlement was made, and after these preliminary matters were over. [116]

Q. Who is the marine man of whom you speak?

A. Mr. Barclay.

(Testimony of Charles M. Whitney.)

Mr. HENGSTLER.—I have a report here, Mr. Lillick.

Mr. LILLICK.—May I have the report made by Mr. Honeyman?

The COURT.—We will meet at two o'clock, gentlemen.

(A recess was here taken until two o'clock P. M.)
[117]

AFTERNOON SESSION.

Testimony of Charles M. Whitney, for Libelant.

CHARLES M. WHITNEY, called for the libelant, sworn.

Mr. LILLICK.—Mr. Whitney has handed me the original policy.

Mr. HENGSTLER.—Who is Mr. Whitney?

Mr. LILLICK.—Q. What was your connection with the Willamette Navigation Company in 1913?

A. I was employed in the office of the president, Mr. William Pierce Johnson, here in San Francisco.

Mr. LILLICK.—Mr. Whitney has handed me the original policy, being policy No. 304, in the Hartford Fire Insurance Company. I will offer that as our next exhibit.

Mr. HENGSTLER.—I thought you stated this morning, Mr. Lillick, that the original was attached to the libel as an exhibit.

Mr. LILLICK.—I thought it was.

Mr. HENGSTLER.—That was a mistake. A copy is attached to the libel as an exhibit.

Mr. LILLICK.—Yes.

(Testimony of Charles M. Whitney.)

Mr. HENGSTLER.—And that is a copy of this?

Mr. LILLICK.—Yes.

Mr. HENGSTER.—No objection to this.

(The policy was here marked “Libelant’s Exhibit 7.”)

Mr. LILLICK.—Q. Have you made a search of the files of the Willamette Navigation Company for the correspondence exchanged with Henry Hewitt & Co., in Portland? A. I have.

Q. Have you in your hand that correspondence, so far as you have it? A. Yes.

Mr. LILLICK.—These all will be offered, one letter at a time, in connection with the testimony of Mr. Sutro this morning, to show the actual situation with reference to the proof of loss [118] that was made, and the receipt of \$1158.80.

The first one is dated February 24, 1913, addressed to Henry Hewitt & Co., Portland, Oregon, and reads as follows:

Libelant’s Exhibit No. 8.

“Gentlemen: We are advised by Mr. Wm. Pierce Johnson, President of our company and located in San Francisco, that the Hartford Fire Insurance Co. are liable under the Cargo Policy #304 for their proportion of the loss of cargo on the Str. ‘Ruth’ which went aground below the Clackamas Rapids on January 11th, and in accordance with this request we enclose herewith detailed claims amounting to \$5621.85, which he suggests that you

forward to San Francisco office for settlement.

“Yours truly,

“WILLAMETTE NAVIGATION COMPANY.

“By _____.”

It does not appear by whom that was signed.

The COURT.—What is the date of that?

Mr. LILLICK.—February 24, 1913.

The COURT.—Who are Hewitt & Co.?

Mr. LILLICK.—The agents in Portland, Oregon, of the Hartford Fire Insurance Company. That will be admitted, will it not, Mr. Hengstler?

Mr. HENGSTLER.—Yes.

(The letter was here marked “Libelant’s Exhibit 8.”)

Mr. LILLICK.—The next is a letter dated “Portland, Oregon, February 28th, 1913,” from Henry Hewitt & Co. to the Willamette Navigation Co., Oregon City, Oregon, reading as follows:

Libelant’s Exhibit No. 9.

“Gentlemen:—We acknowledge receipt of your letter of the 24th inst., enclosing statement of loss of cargo on the steamer ‘Ruth.’ This comes to us as somewhat of a surprise, as we understood from Captain Crowe that this matter had been closed up with [119] the Standard Marine, their policy covers all the loss, inasmuch as it was specific insurance.

“The statement that you enclosed is not quite clear. When the loss occurred we sent Mr. W. B. Honeyman to the wreck immediately to superintend salvage operations for the Hartford. He was

(Testimony of Charles M. Whitney.)

there two days and returned and informed us that Captain Crowe had been placed in charge by the Standard Marine, the cargo being insured in the Standard Marine specifically.

“We do not know the nature or extent of the interest of the Willamette Navigation Company in this cargo and the claims growing out of the loss, consequently are at a great disadvantage in laying the case before the Hartford’s home office at Hartford, in fact we are so devoid of information that our position is humiliating. Could you not inform us as to the Contracts between yourselves and the Paper Companies on which your claim is based, also the amount and terms of insurance carried on this cargo by other Companies, this information will be required before an adjustment can be made.

“We are anxious to make a speedy and satisfactory settlement of this claim as it is our business to give the very best service to our clients, but unless we have detailed information you can readily see that our hands are tied.

“Trusting that at an early date you will be able to give us the necessary particulars, we are

“Yours very truly,

“HENRY HEWETT & CO.

“(Signed) S. G. JEWETT, Sec.”

(The letter was marked “Libelant’s Exhibit 9.”)

Q. Who is E. K. Stanton?

A. At the time this letter was written Mr. E. K. Stanton was in the employ of the Willamette Navigation Company at its Portland Office. It is my

(Testimony of Charles M. Whitney.)

recollection that he [120] was assistant secretary at the time, although I am not positive about that.

Q. Of the Willamette Navigation Company?

A. Yes.

Mr. HENGSTLER.—This next letter that you handed me to examine, Mr. Lillick, is a letter from an employee of the Willamette Navigation Company to the Willamette Navigation Company; in other words, a letter from the Navigation Company to itself.

Mr. LILLICK.—Yes, and I offer it solely for the purpose of showing the situation with reference to the receipt in full that was given by Mr. Sutro.

Mr. HENGSTLER.—I don't see what bearing it has upon the case.

Mr. LILLICK.—It is as follows:

Libelant's Exhibit No. 10.

“April 29, 1913.

“Mr. Wm. Pierce Johnson, President,

“Willamette Navigation Co.,

“San Francisco, Cal.

“Dear Sir:

“RUTH CLAIM:

“Yours of April 25th with enclosures received for which we thank you. We enclose herewith proof of loss properly executed. We have placed a cross (X) in four places in the margin of this proof of loss where reference is made to loss or damage by ‘fire,’ which wording it would appear should be changed to meet the conditions.

“The last paragraph on page one reads:

“‘And the insured hereby claims and agrees to accept from the Hartford Fire Insurance Company by reason of said loss, damage and policy of insurance, the sum of \$1158.80 in full satisfaction of all liability under policy for all loss and damage thereunder by said fire.’

“We presume that the modifications of this clause are so worded that we by the execution of the proof of loss are not signing a complete release which would prevent us making claim for a portion of the Willamette Pulp & Paper Co.’s loss and [121] would like to have you take this matter up with Mr. Sutro and get his opinion before the proof of loss is returned to the Insurance Company.

“Yours truly,

“(Signed) E. K. STANTON.”

“Encl.”

(The letter was marked “Libelant’s Exhibit 10.”)

Mr. HENGSTLER.—That letter is dated April 29th, and refers to a letter from the president, Mr. Wm. Pierce Johnson, evidently to E. K. Stanton, the writer of this letter; this letter is incomplete unless you produce the other letter.

Mr. LILLICK.—I will let you have the entire files that were turned over to me by the company, and you can put the others in if you want to.

Mr. HENGSTLER.—We just want the letter of April 25.

Mr. LILLICK.—I will ask Mr. Whitney if he knows anything about it; it is not among these other letters.

(Testimony of Charles M. Whitney.)

Q. Do you know what was in the other letter, Mr. Whitney?

A. No, I do not, Mr. Lillick, I could not say at this time.

Q. Where did this copy that you have in your hand come from?

A. In our files in our office here in San Francisco.

Q. Have any of these files been withheld from me, to your knowledge?

A. Not to my knowledge.

Mr. HENGSTLER.—Q. Do you know where that letter of April 25 is?

A. No, I do not. If it is not in my files here, I may possibly be able to secure a copy of it from the Portland Office.

Mr. LILLICK.—I will have the witness do that within a day or two.

Mr. HENGSTLER.—We will have no objection to it subject to our inspection of the letter to which this is an answer, but we want to see the other letter.

Mr. LILLICK.—Q. Mr. Whitney, will you be good enough to take [122] this as an instruction: Write to your Portland office for the letter dated April 25, and ask them to return it to me; then, Mr. Hengstler, after submitting it to you it may be filed as an exhibit, if you care to have it. Do you desire to leave that matter in that way?

Mr. HENGSTLER.—Yes, but if it is not sub-

mitted to me, I don't want this letter that is now offered in evidence admitted at all.

Mr. LILLICK.—This letter will be admitted subject to our producing the other letter.

Mr. HENGSTLER.—Yes, and subject to the general objection, also, that it is a letter from an employee of the company to the president of the company, and is clearly self-serving.

Mr. LILLICK.—I next offer a letter dated May 1, 1913, addressed to Henry Hewitt & Co., Portland, Oregon, signed Willamette Navigation Company, by (blank), reading as follows:

Libelant's Exhibit No. 11.

May 1/13.

“Henry Hewitt & Co.,

“Portland, Ore.

“Gentlemen:

“On February 24th we wrote you as follows:

“‘We are advised by Mr. Wm. Pierce Johnson, President of our company and located in San Francisco, that the Hartford Fire Insurance Co. are liable under Cargo Policy #304 for their proportion of this loss of cargo on the Str. “Ruth” which went aground below the Clackamas Rapids on January 11th, and in accordance with his request we enclose herewith detailed claim amounting to \$5621.85, which he suggests that you forward to San Francisco office for settlement.’

to which we will be pleased to have you reply.

“Yours truly,

“WILLAMETTE NAVIGATION COMPANY,

“By _____.”

“June 14/13.

“Retd. by Oscar Sutro.”

(This letter was marked “Libelant’s Exhibit 11.”)

[123]

I next offer in evidence a letter dated May 16, 1913, addressed to Willamette Navigation Co., Oregon City, Oregon, and signed Henry Hewett & Co., by (blank) Secretary. It purports to be a copy.

Mr. HENGSTLER.—I object to that on the ground that it is immaterial and irrelevant.

Mr. LILLICK.—The letter is as follows:

Libelant’s Exhibit No. 12.

“Portland, Oregon, May 16, 1913.

“Willamette Navigation Co.,

“Oregon City, Oregon.

“Gentlemen:

“We are in receipt of a letter from you dated May 1st in which you make inquiry as to the matter of claim under Hartford Cargo Policy No. 304. In this connection we beg to advise that this matter was turned over to the adjuster in San Francisco for settlement and we have had no further work in the matter, and presumed the case had been closed long ago. We are to-day writing to find out

what has been done, and as soon as we receive an answer we shall advise you.

Yours very truly,

“HENRY HEWETT & CO.

“(Signed) By _____, Secy.

“June 14/13.

“Retd. by Oscar Sutro.”

(The letter was marked “Libelant’s Exhibit No. 12.”)

We offer in evidence a copy of a letter dated May 17, 1913.

Mr. HENGSTLER.—The same objection.

Mr. LILLICK.—It is addressed to Henry Hewitt & Co., Portland, Oregon, and reads as follows:

Libelant’s Exhibit No. 13.

“May 17/13.

“Henry Hewitt & Co.,

“Portland, Ore.

“Gentlemen:

“We are in receipt of yours of May 16th, for which [124] we thank you. As soon as you are in receipt of an answer from San Francisco, will be pleased to have you advise us.

“Yours truly,

“WILLAMETTE NAVIGATION COMPANY,

“By _____.”

(The letter was marked “Libelant’s Exhibit 13.”)

We next offer in evidence a copy of a letter dated Portland, Oregon, May 22, 1913, addressed to Willamette Navigation Company, Oregon City, Oregon,

and signed "Henry Hewett & Co., by F. G. Hewett," reading as follows:

Libelant's Exhibit No. 14.

"Portland, Oregon, May 22, 1913.

"Willamette Navigation Co.,

"Oregon City, Oregon.

"Gentlemen:

"Referring to your recent enquiry in regard to the adjustment of loss on the steamer 'Ruth' and liability under Hartford Cargo Policy No. 304, we have to advise that we are just in receipt of a letter from the San Francisco office of the Hartford Insurance Co. which states that on April 24th \$1158.80, the amount of loss under the above mentioned policy, was paid to the Willamette Navigation Co. The draft was handed to your representative in San Francisco, and the Hartford representative states that signed Proof of Loss has not been returned to them and they are still waiting for the same, the draft and proof in question having been delivered a fortnight ago. They also ask that we communicate with you and request that the signed proof be delivered to us as soon as convenient.

"Yours very truly,

"HENRY HEWETT & CO."

"(Signed) By F. G. HEWETT.

(The document was marked "Libelant's Exhibit 14.")

We next offer a copy of a letter dated May 26, 1913, addressed to Henry Hewitt & Co., Portland, Oregon, from the [125] Willamette Navigation Company, reading as follows:

Libelant's Exhibit No. 15.

"May 26/13.

"Henry Hewitt & Co.,

"Portland, Ore.

"Gentlemen:

"Yours of May 22d received. We have written to Mr. Johnson in San Francisco to-day asking that the proof of loss covering the Crown-Columbia Paper Co.'s loss be returned to your San Francisco office as soon as possible. The draft which you refer to amounting to \$1158.00 covers the loss of the Crown-Columbia Paper Co. while our letter of February 24th enclosed copy of claim filed by the Willamette Pulp & Paper Co. for their loss and it is regarding the disposition of this claim that we would like to have your reply.

"Yours truly,

"WILLAMETTE NAVIGATION COMPANY.

"By _____."

(The letter was marked "Libelant's Exhibit 15.")

The rest of the letters that you have, Mr. Hengstler, I do not propose to put in. They are the balance of the file that was handed to me by a gentleman from the office here.

Mr. HENGSTLER.—Correspondence between the same parties?

Mr. LILLICK.—Correspondence between the same parties.

Mr. HENGSTLER.—Will your Honor give us a minute to look these over?

Mr. LILLICK.—I am producing them because it is the whole file; I don't want to put those in.

Mr. HENGSTLER.—We would like to have this letter of March 3 go in.

Mr. LILLICK.—You can offer it.

Mr. HENGSTLER.—As part of the correspondence between these parties, part of which was offered by Mr. Lillick, we offer a [126] letter dated March 3, 1913, from Willamette Navigation Company to Henry Hewitt & Co., Portland, Oregon, reading as follows:

Respondent's Exhibit "B."

"March 3, 1913.

"Henry Hewitt & Co.,

"Portland, Ore.

"Gentlemen:

"Yours of February 28th received. We had also understood from Capt. Crowe that the Standard Marine Insurance Co. would assume the entire cargo loss on the Str. "Ruth" and were as much surprised as you are when we received word from our San Francisco office that your company should also bear a portion of this loss.

"We have no knowledge whatever of the insurance other than that carried in the Hartford Company which is carried on these cargoes, the contracts all being in San Francisco, and in as much as our San Francisco office have requested us to ask you to refer the matter to your San Francisco office, we presume that it has already been taken up

with your office there and suggest that you place the entire matter in their hands.

“Yours truly,

“WILLAMETTE NAVIGATION COMPANY.

“By _____.”

(The letter was marked Respondent’s Exhibit “B.”)

Who, Mr. Lillick, is Captain Crowe? Did he represent the Standard Marine Insurance Company?

Mr. LILLICK.—He was a man who occupied the same position relatively to us as Mr. Honeyman did to your company.

Mr. HENGSTLER.—And who superseded Mr. Honeyman?

Mr. LILLICK.—No, not superseded, by any manner of means; the two went out together, as I understand it, Mr. Hengstler.

Mr. HENGSTLER.—Then we will prove that. We offer a letter dated June 2, 1913, from Henry Hewett & Co. to Willamette [127] Navigation Company, Oregon City, Oregon, reading as follows:

Respondent’s Exhibit “C.”

“Portland, Oregon, June 2, 1913.

“Willamette Navigation Co.,

“Oregon City, Oregon.

“Gentlemen:

“Upon receipt of your letter of May 26th in regard to loss of cargo on steamer ‘Ruth,’ we took up the matter with the San Francisco office of the

(Testimony of Charles M. Whitney.)

Hartford, and they claim that the loss of the Willamette Pulp & Paper Co. was settled and paid by the Standard Marine through J. B. F. Davis, and that no claim was made through your San Francisco representative on the Hartford.

"Will you kindly advise us in this connection if their statement is correct or if they have been in error?"

"Yours very truly,

"HENRY HEWETT & CO.

(Signed) By S. G. PRUITT, Secy."

(The document was marked Respondent's Exhibit "C.")

The next is a letter dated June 3, 1913, addressed to Henry Hewett & Co., apparently in answer to the letter of June 2, and it is signed "Manager," but there is no signature to it. Who was Mr. McBain, Mr. Lillick?

Mr. LILLICK.—Q. Who was Mr. McBain, in Portland?

A. He was, at the time, Secretary of the Willamette Navigation Company.

Mr. HENGSTLER.—Q. Who was the manager of the Willamette Navigation Company on June 3, 1913, Mr. Whitney?

A. Mr. McBain was secretary and manager.

Mr. HENGSTLER.—This letter of June 3, 1913, is by the manager of the Willamette Navigation Company to Henry Hewett & Co., Portland, Oregon, and reads as follows:

Respondent's Exhibit "D."

"June 3, 1913.

"Henry Hewett & Co.,

"Portland, Oregon.

"Gentlemen: [128]

"Yours of the 2d at hand.

"We will address our San Francisco office this date to ascertain whether the claim of the Willamette Pulp & Paper Co. against us for loss on the Steamer 'Ruth' has been settled by others and withdrawn. Our records show that the claim still stands.

"Yours truly,

"Manager.

"McB/T-CSF."

(The letter was marked Respondent's Exhibit "D.")

Mr. LILLICK.—I might as well put these other two in.

Mr. HENGSTLER.—They only encumber the record, they haven't anything to do with this.

Mr. LILLICK.—I will put in this one.

Mr. HENGSTLER.—Read it in, if you can see any connection at all.

Mr. LILLICK.—Let us put it in. It is dated March 11, 1913.

Mr. HENGSTLER.—It is objected to by me on the ground it is immaterial, irrelevant and incompetent and it is merely encumbering the record.

Mr. LILLICK.—It reads as follows:

(The letter was marked "Libelant's Exhibit 16.")

(Testimony of Adam Gilliland.)

Libelant's Exhibit No. 16.

“Portland, Oregon, March 11th, 1913.

“Willamette Navigation Co.,

“Oregon City, Oregon.

“Gentlemen:

“Replying to your letter of March 3d in regard to damage to cargo on the Steamer ‘Ruth’ and liability under Hartford Policy, we have to state that this matter has been placed in the hands of the San Francisco representatives of the Hartford for adjustment.

“Yours very truly, [129]

“HENRY HEWETT & CO.

“By (Signed) _____,

“Secy.”

Testimony of Adam Gilliland, for Libelant (Recalled).

ADAM GILLILAND, recalled for libelant.

Mr. LILLICK.—Q. As I remember it, Mr. Gilliland, you testified you have no recollection of the statement of the loss of the Willamette Pulp & Paper Company, which I am handing you, and which it is my recollection was attached to the letter that I wrote you under date of June 17, 1913.

A. I have no recollection of that.

Mr. LILLICK.—Mr. Hengstler, have you that in your file?

Mr. HENGSTLER.—What letter is that?

Mr. LILLICK.—It is a copy of a statement of the loss.

Mr. HENGSTLER.—Mr. Lillick, this morning you asked us to produce any reports that Mr. Honeyman made to the respondent company. I deliver to you now the report which he made to us.

Mr. LILLICK.—We offer in evidence the affidavit of W. B. Honeyman, dated May 25; there is no year after it, and the notarial seal has no date upon it. Will you stipulate that this was intended as of May 25, 1913, Mr. Hengstler?

Mr. HENGSTLER.—Yes.

Mr. LILLICK.—It reads as follows:

Libelant's Exhibit No. 17.

“I, W. B. HONEYMAN, being first duly sworn, depose and say that at a time hereafter mentioned, I was acting as cargo surveyor on board the Str. ‘RUTH’ stranded in the Willamette River January 11th, 1913; that on January 13th, at 10 A. M., I went on board the Str. ‘RUTH’ where she lay on the East Bank of the Willamette River about one mile by river below Oregon City, [130] and found her beached with her bow twenty feet on the land and her stern in fifteen feet of water. The water at the stern and covered the paper cargo and was almost to the roof of the deck house; that to the best of my knowledge and belief the vessel had sustained no casualty prior to her beaching, such as stranding or collision, but leaked going through the rapids, her seams having sprung as the result of overloading. I was not notified of any casualty having occurred and as above stated, do not

(Testimony of Adam Gilliland.)

believe any accident had occurred but that the beaching became necessary due to the leakage of the vessel as above specified.

“WM. B. HONEYMAN.

“Subscribed and sworn to before me this 25th day of May.

“L. A. MATHISEN, (Seal)

“Notary Public for Oregon.

“My commission expires Nov. 3, 1919.”

I offer this paper solely for the purpose of showing that the Hartford Fire Insurance Company had notice of the loss, and sent a man out. After the conclusions of Mr. Honeyman that the vessel had sustained no casualty prior to her beaching, such as stranding, or collision, but leaked going through the rapids, her seams having sprung as the result of overloading, I do not offer that and do not wish to be bound by the document in any other way than that it shows the fact that the Hartford Insurance Company had someone at the wreck on the 13th of January, 1913, representing them.

Mr. HENGSTLER.—You are offering the whole affidavit. However, you offer it for a restricted purpose, do you?

Mr. LILLICK.—I offer it for the restricted purpose of showing that your people had notice of the loss.

Mr. HENGSTLER.—I understand your position.

Mr. LILLICK.—Well, if you understand the position, Mr. [131] Hengstler, all right; I do not

(Testimony of Adam Gilliland.)

wish to be bound by the statements in the affidavits, as to its conclusions.

Mr. HENGSTLER.—It is admitted, is it not, that Mr. Honeyman is dead?

Mr. LILLICK.—I don't know that. Mr. Crowe is dead. If you say he is dead, I will take your word for it.

Mr. HENGSTLER.—I think he has died.

Mr. LILLICK.—Q. Do you know, Mr. Gilliland?

A. No, I do not know, but I am under the impression he is dead.

Mr. LILLICK.—All right. Captain Crowe is dead. He was the man we had up there. I simply mention that to show why we have not his testimony?

(The document was here marked "Libelant's Exhibit 17.")

Now, we offer this copy of letter for the sole purpose of showing that Mr. Honeyman was there and representing you, and reported to you the facts as he saw them. This is dated January 21, 1913, and reads as follows:

Libelant's Exhibit No. 18.

"Portland, Oregon, January 21, 1913.

"C. S. Timberlake, Gen. Agent.

"Hartford, Conn.

"Dear Sir:

"Re Steamer 'Ruth' beached Jan. 11, 8 A. M.

"At the request of your agents, Henry Hewett

& Company, on January 13th at 10 A. M. I went on board the steamer 'Ruth' where she lay on the bank of the Willamette about one mile by river below Oregon City, and found her bow 20 feet out on the land, and her stern in 15 feet of water. The owners had already taken off a part of the cargo in good condition, as below noted. The total cargo on board consisted of 395,019 lbs of paper, owned by the Willamette Pulp and Paper Company and the Crown-Columbia Paper Company. [132]

"There was saved in good order.....144,571 lbs.

"There was saved in bad condition....115,507 lbs.

"There was totally lost.....134,941 lbs.

395,019 lbs.

"I ordered the salvors to cast adrift such portion of the cargo as would cost more to recover than the pulp would be worth, its value being but \$5.00 per ton, and the cost of recovering the badly damaged would exceed that sum.

"I directed the salvage work on the 13th and 14th; on the 14th inst. Captain Crowe arrived at the 'Ruth' with a message from Henry Hewett & Company., stating that J. B. F. Davis & Son had appointed him to represent the insurers on the Willamette Pulp & Paper Company's and Crown-Columbia Paper Company's goods and that Captain Crowe would attend to future operations therefore I could return home. Your agents will give you particulars in the matter of insurance of J. B. F. Davis & Son, by which the Hartford escapes lia-

bility other than the enclosed expense bill.

“Truly yours,

(Signed) WM. B. HONEYMAN.”

(The document was marked “Libelant’s Exhibit 18.”)

Mr. HENGSTLER.—Mr. Lillick, in connection with this letter I want to show you a letter that has a close connection with the letter of January 21, 1913, and which I will introduce in evidence afterwards, but I think it will simplify things and expedite the trial if it is offered now.

Mr. LILLICK.—I have no objection to your offering it out of order, Mr. Hengstler.

Mr. HENGSTLER.—I offer this letter of January 22, 1913, by Henry Hewett & Co., to Mr. C. S. Timberlake, General Agent, Hartford, Conn. He is the same gentleman to whom the last report was made, and he is the general agent of the defendant insurance company. It reads: [133]

Respondent’s Exhibit “E.”

“Portland, Ore. January 22, 1913.

“Mr. C. S. Timberlake, General Agent,

“Hartford, Conn.,

“Dear sir:

“Steamboat ‘Ruth.’

“Referring to our letter of January 14th it is now necessary for us to explain that after Mr. Wm. B. Honeyman had directed Salvage operation on cargo of above craft for two days, Captain Crowe was notified by the Standard Insurance Co’s. Manager in San Francisco to attend to the business.

"It now appears that the Willamette Pulp & Paper Company and Crown Columbia Paper Company, owners of the cargo, were insured under contract with the Standard and that our insured were erring on the safe side when they notified us that there was a loss under your policy. We of course withdrew as soon as we learned about this direct insurance, and can at present see no reason why you should be asked to contribute any part of the loss. We presume that under the circumstances Mr. Honeyman's bill for services will be in order.

"Very truly yours,

(Signed) "HENRY HEWETT & CO."

(The letter was marked Respondent's Exhibit "E.")

Mr. LILLICK.—I object to that letter as hearsay and not binding upon the libelant, and not in any way covering any of the issuance of the case.

Mr. HENGSTLER.—It clearly explains the previous letter.

The COURT.—Let it go in.

Mr. LILLICK.—Mr. Hengstler, you have been unable to find, have you, the proof of loss Mr. Sutro testified he made out for the \$1,158.80?

Mr. COOGAN.—We have that here. [134]

Mr. LILLICK.—We offer in evidence the proof of loss which was testified to by Mr. Sutro, and which is referred to in the correspondence that has been read to the court, this proof of loss having been furnished me by Mr. Hengstler at my request.

Mr. HENGSTLER.—I wish to state the objection to the introduction of this proof of loss on the ground that it is immaterial, irrelevant and incompetent; the date of it shows that it was made in the end of May or the beginning of June, doesn't it, Mr. Lillick?

Mr. LILLICK.— I didn't look at the date. It is the proof of loss that was shunted back and forth.

Mr. HENGSTLER.—I don't want it introduced as any proper proof of loss under the policy.

Mr. LILLICK.—The money was paid under it.

Mr. HENGSTLER.—The money was paid long before that; you admit that, don't you?

Mr. LILLICK.—The money was paid, under Mr. Sutro's testimony, on April 24.

Mr. HENGSTLER.—And this shows that it was received at the home office on May 27.

Mr. LILLICK.—You admit that Henry Hewett & Co., are the agents of the Hartford Fire Insurance Company in the City of Portland?

Mr. HENGSTLER.—Yes.

Mr. LILLICK.—This reads as follows:

Libellant's Exhibit No. 19.

“Amt. \$ ———

“PROOF OF LOSS.

“To THE HARTFORD FIRE INSURANCE COMPANY of Hartford, Conn.

“By your Cargo Policy of Insurance No. 304 issued by THE HARTFORD FIRE INSURANCE COMPANY of Conn., at your Agency at Portland,

Or., said insurance commencing at 12 o'clock, noon [135] on the 10th day of May, 1912 and terminating at 12 o'clock, noon on the 10th day of May 1913, you insured Willamette Navigation Co., a Corp., against loss and damage by, ~~fire~~ as therein expressed, to the amount of Twenty Thousand (20,000) Dollars, according to the terms and conditions printed in said Policy, the written portion of said Policy and all written or printed conditions, endorsements, provisions, agreements, assignments and transfers endorsed thereon, or added thereto, are as follows:

“At and from Oregon City, Oregon, to ports and places in the Willamette and/or Columbia Rivers and tributaries, and from Portland, Oregon, and port and places in the Willamette and/or Columbia Rivers and tributaries to Oregon City, Oregon, direct or via ports and places. Warranted not to use ports and places below Astoria or above Cascade Locks on the Columbia River or above Pulp Siding on the Willamette River.

“This policy also covers property while contained on Ainsworth Dusk in the City of Portland, Oregon, for a period of twenty-four hours after discharge from vessel, free from average.

“This Company under the terms and conditions of this policy is not liable in case of total, or partial loss, or both combined, of any one cargo while on board steamers ‘Ruth’ and/or ‘N. R. Lang’ going down the Willamette or Columbia River for an amount in excess of \$8000 and going up the Willa-

mette or Columbia Rivers in an amount in excess of \$2000.

“Waranted free from particular average under five per cent (5%) but to include salvage and general average charges.

“Attached to and forming part of Cargo Policy No. — issued through the Marine & Transportation Department of the Hartford Fire Insurance Company, Hartford, Connecticut, but not valid unless countersigned by HENRY HEWETT & COMPANY, Agents, [136] Portland, Oregon.

“_____,
“Agents.

“Loss, if any, payable to _____.

“The total insurance and agreements for insurance, verbal or written, valid and/or invalid, covering on said property or any part thereof, at the time of the loss, including the above-mentioned Policy, was Twenty Thousand Dollars, and no more. See apportionment sheet or Schedule of Other Insurance attached hereto.

“NOTE.—If all policies and agreements for insurance are not entirely concurrent, make schedule of additional Insurance, giving name of each Company, and the entire written portion of each policy, and all written or printed conditions, endorsements, provisions, agreements, assignments and transfers endorsed thereon or added thereto.

“A loss occurred on the 11th day of January A. D. 1913, at about the hour of — o’clock, — M., by which the above property so insured was

destroyed or damaged, as herein set forth; and which originated as follows:

“Stranding of Steamer ‘Ruth’ on bar in Willamette River on trip from Oregon City to Portland.

“The cash value of the property belonging to and owned by the Crown-Columbia Paper Company at the time of loss, the loss and damage on the same for which claim is hereby made, the total insurance upon said property, the total claim for loss under the entire insurance on said property and the insurance and claims under this policy upon said property belonging to and owned by the Crown-Columbia Paper Company is. . . . \$1158.80.

“And the insured hereby claims and agrees to accept from the Hartford Fire Insurance Company by reason of said loss and [137] damage to said property belonging to and owned by said Crown-Columbia Paper Company the sum of \$1158.80, in full satisfaction of all liability under said policy for said loss and damage to said property belonging to and owned by said Crown-Columbia Paper Company.

“The amount of sound value herein stated does not exceed the cash market value at the time of the said loss of the said property so damaged and so destroyed. The said property belonging to and owned by said Crown-Columbia Paper Company on which this claim for loss is made belonged to and was owned by said Crown-Columbia Paper Company under an agreement with the Willamette Navigation Company, under which the latter Company assumed responsibility for marine perils,

and under which said last-mentioned company has paid said Crown-Columbia Paper Company.

“That said loss did not originate by any act, designed or procurement on the part of assured, nor on the part of any one having any interest in the property insured, or in the said Policy of Insurance, nor in consequence of any fraud or evil practice done or suffered by assured. Nothing has been done by or with assured’s privity or consent to violate the conditions of the Policy or to render it void; and no articles are mentioned herein but such as were in the building damaged or destroyed, and owned by and were in the possession of the said assured at the time of the said fire. No property saved has been in any manner concealed, and no attempt to deceive the said Company as to the extent of said loss or otherwise has in any manner been made. Any other information that it may be in assured’s power to give will be furnished by assured, if required, and considered a portion of these proofs.

“It is furthermore understood and agreed that all bills, [138] invoices, schedules and statements made by the assured, and attached to this Proof of Loss, are to be incorporated into this proof, and are hereby duly sworn to and made a part thereof.

“It is agreed by claimant that the furnishing of this blank, or making up proofs by this Company’s Adjuster, is not to be considered as a waiver of any rights of this Company.

“Witness our hand at Oregon City this 28th day of Apr. 1913.

“WILLAMETTE NAVIGATION COMPANY,

“By E. KENNETH STANTON,

Auditor.

“Personally appeared E. Kenneth Stanton, signer of the foregoing Statement, who made solemn oath to the truth of the same, and that no material fact is withheld that the said Company should be advised of, before me this 28th day of April, 1913.

“B. T. McBAIN,

“Notary Public for Oregon.”

[Endorsed]: “Claim No. —. Proof of Loss. The Hartford Fire Insurance Co. of Hartford, Conn. Palache & Hewitt General Agents. Assured Willamette Navigation Co. Agency Portland, Or. Policy No. Cargo #304. Amount of Policy, \$20,000. Amount claimed \$1158.80 Amount awarded, \$——. Date of Loss, Jany. 11/13. Proofs Received, —. Date of Payment, —. Adjuster, —.” (In rubber stamp:) “Hartford Fire Ins. Co. Received June 2, 1913. Answered —. J. D. Cail, Asst. G. A.” (Also bearing time stamp of Palache & Hewett, dated May 27, 1913.)

(The docket was marked “Libelant’s Exhibit 19.”)

You may take the witness, Mr. Hengstler.

Mr. HENGSTLER.—I expect to recall Mr. Gilliland as a witness on our behalf. I think it is best to let Mr. Lillick finish his case. I have no cross-examination of the witness. [139]

Mr. LILLICK.—We rest.

Testimony of Adam Gilliland, for Respondent (Recalled).

ADAM GILLILAND, recalled for the respondent.

Mr. HENGSTLER.—Q. Mr. Gilliland, you were in charge of the marine business, or the Marine Department of the Hartford Fire Insurance Company at the time when the accident to the “Ruth” and the subsequent negotiations with the Willamette Navigation Company occurred, were you not?

A. Not directly manager of the Marine Department; they had a man operating that department other than myself. My connection with this matter arose owing to the fact that I had general charge of fire loss adjustments for the Hartford, and when this claim developed I was consulted about it.

Q. But you attended to this business, did you not, for the Hartford Fire Insurance Company?

A. Yes.

Q. Was there ever filed in the office of the Hartford Fire Insurance Company, the respondent corporation, any writing on the part of the Willamette Navigation Company, signed by the Willamette Navigation Company, giving what would be a proof of loss, and stating the loss which the Willamette Navigation Company claimed with reference to the accident which happened to the paper on the “Ruth.”

Mr. LILLICK.—We object to that as calling for the conclusion of the witness on a pure question of

law. Perhaps we may save time by a stipulation I am willing to make, that in so far as our records disclose the facts, nothing has been filed by us with the Hartford Fire Insurance Company, other than the letters that have been exchanged, and the single [140] statement of the loss which, by the way, has not yet been furnished me, as being attached to that letter. I will have to ask the Court's permission to testify to that, myself.

Mr. HENGSTLER.—It is not necessary for you to testify to it. I told you that if you say that statement was attached to that letter I would admit it.

Mr. LILLICK.—The only difficulty about it is that it may be in a different form. I had it copied in my office and had it attached to my letter. I know that. It would help if you could give me the original. It is only that I am speaking from my recollection, and it is not safe to do so after so many years. This is it. Now, if you will let me put that in, there will be no question about it, and I will stipulate with you that nothing but these documents that I have offered in evidence were filed by us; in other words, my proof of loss is a proof of loss that is made up of the facts that the Hartford Fire Insurance Company had furnished it by Mr. Honeyman, and by the information that we passed it in the correspondence that was exchanged. That will be my argument. Will you be satisfied with that stipulation?

Mr. HENGSTLER.—I would like to have you stipulate to this, that there are—

Mr. COOGAN.—Here are two different forms of that statement. The figures are the same, but the substance is a little different. Which one of those two do you think you sent?

Mr. LILLICK.—This came from my files. They are the same thing, I think, only in a little different form. We will put this one in. Then it may be stipulated that this document is now offered in evidence, which will be Libellant's Exhibit 20, and was the statement of the loss of the Willamette Pulp & [141] Paper Company appended to my letter addressed to Mr. Gilliland under date of June 13, 1913; other than that, the Willamette Navigation Company filed no other statement or no other proof of loss except what we will contend is made up of the first statement on the \$1158.80 and the other documents. Does that cover it, Mr. Hengstler?

Mr. HENGSTLER.—Yes, it covers it so far as it goes. I want to ask you for a further stipulation, so as to avoid any testimony with reference to that: Will you admit, Mr. Lillick, that no statement was made stating the cause or the extent of the accident?

Mr. LILLICK.—I would be admitting, Mr. Hengstler, what I am intending to argue to the Court was done, because my argument will be, on the question of proof of loss, that your own man, Mr. Honeyman, went out, knew exactly what the situation was, and reported it to you; and that the

object of a proof of loss is to investigate for yourself, if you care to; and that following that nothing was filed in the Hartford Fire Insurance Company by the Willamette Paper Company other than what the Court has before it now in the various letters that have been offered, and the other documents that are before it.

Mr. HENGSTLER.—I would like a particular admission also with reference to this, that no statement of any nature was made by your company respecting the nature of the interest of the Willamette Navigation Company in the property.

Mr. LILLICK.—My contention in the argument, Mr. Hengstler, will be that formal proofs of loss were waived by the company by their denial of liability; that would cover all of what you have in mind now by picking out separate clauses in the context of the paragraphs of the policy. [142]

Mr. HENGSTLER.—In other words, do you admit that no such statement was made?

Mr. LILLICK.—No, I do not, because the argument will be made—

Mr. HENGSTLER.—I am not asking you for what argument you are going to make, but I mean to the effect that any statement was ever furnished to the respondent company of the nature of the interests insured in the property.

Mr. LILLICK.—I will not admit that. You will have to put in other proof about that if you feel that you can by negation prove it.

Mr. HENGSTLER.—Mr. Lillick, will you admit that no statement was ever made as to what other insurance or insurances there was or were upon the property at the time of the loss except the statement I drew out by the interrogatories in our answer and which drew forth a verified answer on your part?

Mr. LILLICK.—No, Mr. Hengstler, that is not the fact, because there is a letter which was introduced with the file we have before the Court now saying there was no other insurance, and, as a matter of fact, there was no other insurance. The fact is, Mr. Hengstler, that the Standard Marine Insurance Company had no insurance policy for the Willamette Navigation Company; the Standard Marine Insurance Company had a policy of Insurance in the Willamette Pulp & Paper Company. We did not insure the Willamette Navigation Company, and there never has been a policy issued by the Standard Marine in the name of the Willamette Navigation Company.

Mr. HENGSTLER.—But you had a policy insuring the Willamette Pulp & Paper Company.

Mr. LILLICK.—Yes.

Mr. HENGSTLER.—And, as a matter of fact, Mr. Lillick, you [143] admit, do you not, that under that policy the Standard Marine Insurance Company paid the full loss to the Willamette Pulp & Paper Company.

Mr. LILLICK.—No, they did not. Now, you are going into a question that I don't know that

the Court would allow you to go into. It was paid under a form of loan.

Mr. HENGSTLER.—I am not asking you about the form. Was it paid?

Mr. LILLICK.—Categorically, no, it was not. There was no payment made under the insurance. There was no insurance carried by the Willamette Navigation Company in the Standard Marine Insurance Company.

Mr. HENGSTLER.—But the Willamette Pulp & Paper Company was paid the full amount of this loss as a loan?

Mr. LILLICK.—Yes, as a loan.

Mr. HENGSTLER.—What are the conditions of that loan?

Mr. LILLICK.—We produce the loan receipt under which the Standard Marine Insurance Company paid the Willamette Pulp & Paper Company the amount set forth in the receipt.

Mr. HENGSTLER.—The amount is \$5531.85, and it is dated February 28, 1913.

Mr. LILLICK.—Will you offer that in evidence, Mr. Hengstler, as it is idle for me to make admissions of the character I am making unless the Court has before it the character of the receipt. Do you offer it?

Mr. HENGSTLER.—No, I am satisfied.

Mr. LILLICK.—I refuse to answer another question in the way of a stipulation.

Mr. HENGSTLER.—I am satisfied with the payment having been made. [143½]

Mr. LILLICK.—Then I have to repeat that no insurance was carried. The payment was made as a loan. Of course, you know, as well as I do, the law obtaining as to that kind of a receipt. All right, Mr. Hengstler, go ahead.

The CLERK.—Do you offer that as one of your exhibits, Mr. Lillick?

Mr. LILLICK.—I am rather at a loss to know how to offer it. I wanted it offered in connection with the question Mr. Hengstler asked me.

Mr. HENGSTLER.—You offered it in evidence.

Mr. LILLICK.—You are asking me questions, and I am answering them, as if I were on the witness-stand, and I produce a paper and you refuse to accept the paper and offer it in evidence; I must, therefore, in order to have it before the Court, offer it.

The COURT.—Well, the Court will introduce this for its own information.

Mr. LILLICK.—I offer it, your Honor. Before calling it to your Honor's attention, however, I desire to have the other paper that I referred to just a few moments ago marked "Libelant's Exhibit 20."

(Libelant's Exhibit 20 is as follows:)

Libelant's Exhibit No. 20.

"WILLAMETTE PULP AND PAPER COMPANY.

"STATEMENT LOSS—STEAMER 'RUTH.'

Original Amount Shipped:

43	Rolls 49 $\frac{3}{4}$	San Francisco Examiner.....	29932 #
60	" 66	"	61906
107	" 67	Call, Chron.....	113213
83	" 67	Times Mirror.....	86458
26	" 66	L. A. Examiner.....	27030
6	" 33	"	3077
			321616 #

Less amount recovered and taken to Portland:

3	Rolls 33"	L. A. Examiner.....	1473 #
42	" 67	Chron.	43909
17	" 49 $\frac{3}{4}$	S. F. Exam.....	12835
46	" 66	"	47396
			105613 #

[144]

216003 # at \$2.50 \$5400.08

\$5400.08

(Forward)

Less Salvage on amount actually returned to mill as
per agreement with Capt. Albert Crowe, Sur-
veyor:

93½ Long Rolls at 1000# 93500#
7½ ¾ “ at 700# 5250

246.88

98750# at \$5.00 per ton

Lost overboard 117253#

\$5153.20

Services of Str. “N. R. LANG” and crew removing dam-
aged paper and returning to mills as per certified
copy of W. N. Co. invoice attached.....

256.25

Services of crew of Str. “Ruth” as per invoice attached
Meals served to officers and Crew by Str. “N. R. LANG”—

20.70

51 meals at 25¢

12.75

Services of Captains Young and Hegdale supervising
work 2½ days

28.70

Rental of Willamette Pulp & Paper Co.'s barges two days at \$10.00.....	\$20.00	
Time of barge foreman and crew assisting in unloading of the cargo.....	40.25	
Services of Capt. Crowe, Surveyor, superintending Salvage of goods and sale of same:		
5 days' services of self.....		\$75.00
2 " " " help		8.00
Expenses		7.00
		<hr/>
		\$5621.85

(The document was marked "Libelant's Exhibit 20.")

("Libelant's Exhibit 21" reads as follows:)

Libelant's Exhibit No. 21.

"San Francisco, February 28, 1913.

"Standard Marine Insurance Co.,

"#507 Montgomery Street,

"San Francisco.

"Gentlemen:

"S. S. 'Ruth.'

"For and in consideration of your advancing to us the sum of \$5531.85, receipt of which is hereby acknowledged, as a loan to be repaid, without interest, as recovery is effected from [145] the carriers in respect of the merchandise hereinafter referred to, we hereby agree to make claim against the carriers, and, or, bailees of the said merchandise in whose hands the said merchandise received damage, and upon receiving payment from them we hereby undertake to refund to you whatever is recovered. This is upon the express understanding and agreement that you are to be responsible for all costs, attorneys' fees and expenses incurred in connection with the said claim.

"The merchandise above referred to is:

Original Amount Shipped:

43 Rolls 49 $\frac{3}{4}$ " S. F. Examiner.....	29932#
60 " 66 ".....	61906
107 " 67 Call, Chron.....	113213
83 " 67 Times Mirror.....	86458
26 " 66 L. A. Examiner.....	27030
6 " 33 ".....	3077
	321616#

Less amount recovered and taken to Portland:

3 Rolls 33" L. A. Examiner.....	1473#
42 " 67 Chron.....	43909
17 " 49 $\frac{3}{4}$ S. F. Examiner.....	12835
46 " 66 ".....	47396
	105613#

216003# @ \$2.50 \$5400.08

Less Salvage on amount actually returned to mill as
per agreement with Capt. Albert Crowe, repre-
sentative of Standard Marine Insurance Co.:

931½ Long Rolls @ 1000#.....	93500#	
71½ ¾ “ @ 700	5250	
	98750# @ \$5.00 per ton	\$246.88
		<hr/>
		\$5153.20

Lost overboard 117253#

Services of Str. ‘N. R. Lang’ and crew removing dam- aged paper and returning to mills as per certified copy of W. N. Co. [146] invoice attached.....	256.25
Services of crew of Str. ‘Ruth’ as per invoice attached..	20.70
Meals served to officers and crew of Str. ‘N. R. Lang’— 51 meals @ 25¢.....	12.75

Services of Captains Young and Hegdale supervising work 2½ days.....	\$28.70
Rental of our barges 2 days @ \$10.00.....	20.00
Time of Barge foreman and crew assisting in unloading of the cargo.....	40.25
	<hr/>
	\$5531.85

“Yours very truly,

“WILLAMETTE PULP & PAPER CO.,

“By F. G. WIGHT, Secy.”

(The letter was marked "Libelant's Exhibit 21.")

Mr. HENGSTLER.—Mr. Lillick, did I understand you correctly to say you were not willing to make any further stipulations because I did not offer a paper in evidence?

Mr. LILLICK.—I am anxious to have the Court have the facts. I thought we could submit this to the Court by stipulation.

The COURT.—I suppose it may be taken for granted that the Willamette Pulp & Paper Company received \$5500 under that agreement, and under a policy of insurance issued by the other company.

Mr. LILLICK.—That is it exactly. I would like to have this statement put in, that the amount paid the Willamette Pulp & Paper Company under that form of receipt was \$5531.85, which does not include a charge of \$90 for the services of Crowe as a surveyor, which would make it a total of \$5621.85.

Mr. HENGSTLER.—That shows in the paper, itself. What I wanted particularly, Mr. Lillick, was this, that none of these so-called proofs or statements were made within thirty days [147] from the time when this accident happened.

Mr. LILLICK.—No, I cannot admit that because the letters, as they are before the Court, with the testimony of Mr. Sutro, cover the entire situation.

Mr. HENGSTLER.—Q. Mr. Gilliland, did you, within thirty days from the time of this accident,

receive any writing from the Willamette Navigation Company containing any particular account of the accident or stating the causes of the accident, or the extent of the accident, and the nature of the interest of the insured in the property, or what other insurance of insurances there was or were on the property at the time of the loss? Did your office, or your company, receive any such statement within thirty days after the accident? A. No—

Mr. LILLICK.—Just a minute, Mr. Gilliland. Your Honor, I don't want to make any captious objections; the witness was first asked by Mr. Hengstler whether the Willamette Navigation Company had filed such a statement, and then, at the end of the question he is asked whether any such statement had been filed. I object to that on the ground that the testimony already adduced shows definitely what the situation was in respect to that. Mr. Gilliland can only know what went on down here in San Francisco and can quite honestly say no; but Henry Hewett & Co., of Portland, were the agents of the Hartford Fire Insurance Company up in Portland, and were attending to the matter of this case up there.

Mr. HENGSTLER.—Why don't you admit that no attempt was made to furnish such proof within thirty days?

Mr. LILLICK.—Because I do not think that is true. I think the truth is that that was furnished. I don't mean that any statement of the insurance was shown, other than as shown by the letters.

Mr. HENGSTLER.—Any statement containing any of the facts [148] which are called for under what I have just read, under the terms of this policy. None of your letters which you introduced in evidence were written within thirty days after the accident; most of them were written long after the accident. Why don't you admit that within thirty days no such statement was given to the company?

Mr. LILLICK.—Either you misunderstand me or I misunderstand you. I say you are just asking the witness for a conclusion of law. I say, open-handedly, that nothing other than what is before the Court now has been furnished by us, and these facts speak for themselves.

The COURT.—Then this is the situation: Unless the matters inquired of now by Dr. Hengstler are included in these documents and letters already presented, and the proofs offered by the libellant up to this time, such has never been furnished to the company.

Mr. LILLICK.—That is it, exactly.

Mr. HENGSTLER.—Provided that your Honor considers this evidence as competent evidence.

The COURT.—Well, if they don't prove it they don't prove it. Other than this, nothing has been done by the libellant.

Mr. LILLICK.—That is the fact.

Mr. HENGSTLER.—Q. Did you ever receive any affidavit from the master of the "Ruth," or any statement verified by the oath of the master

(Testimony of Adam Gilliland.)

of the "Ruth," within thirty days after the accident? A. No.

Q. With reference to the receipt that was given to the company by Mr. Sutro, you had the negotiations with Mr. Sutro personally, did you not?

A. Yes.

Q. I show you a document marked Respondent's Exhibit "A": Were [149] you present when this document was executed? A. Yes.

Q. Will you tell the Court the circumstances preceding the execution of the document, and the circumstances under which it was executed?

A. We were presented with the statement from the office of the Navigation Company, or the paper companies—I think they occupied a joint office, I am not sure, but there was a memorandum showing the number of rolls of paper destroyed, and the value, one of the Willamette Pulp & Paper Company, and another for the Crown-Columbia Paper Company; the sum of the two, I imagine, was between \$5000 and \$6000; I am not sure of the amount. We took the subject up with Mr. Sutro, as the attorney representing the assured, the Willamette Navigation Company, and all of our negotiations were carried on with him. I may remark here that Mr. Sutro is a personal friend of both Mr. Palache and Mr. Hewett, who were the general agents of the company—

Q. Here in San Francisco?

A. Here in San Francisco, and also an acquaintance of mine, but not on the same terms as with

(Testimony of Adam Gilliland.)

those two gentlemen. The company did not concede any liability, although it may not have denied it; it expressed doubt—particularly our home office expressed doubt about any liability existing under that contract under the conditions as they then existed. The thing dragged along for a while, and, finally, the proposition came—I think Mr. Sutro was in the office of Palache & Hewett, and I was called in, and he agreed that if we would pay the amount set down there, \$1180, whatever was due the Crown-Columbia Paper Co., he said that he would call the thing square. I set to work and made up the paper on that basis. I made up this receipt and wrote a draft, and took it in to Mr. Sutro and paid him. Subsequently, I thought [150] it would be desirable to complete our files by having a proof of loss, just as a matter of form. I made up a proof of loss, after all this was completed, and sent it in, and it took quite a length of time to get it back; there were additions made to it. I think I met Mr. Sutro on the street and asked him why all these pasters were on the proof of loss, and he said, “Well, that is something that Mr. Lillick wanted put on.” Mr. Sutro was very well satisfied to make the compromise settlement on that basis; he so expressed himself verbally, and also through correspondence with Mr. Hewett. He complimented the company on its attitude. On the subsequent proceedings, which culminated in this suit being brought, I asked him how such a thing could happen, and he

(Testimony of Adam Gilliland.)

said that he was placed in a very embarrassing position, that it was entirely against his wishes and desires, but he was in quite a dilemma. And I told him we had nothing to offer on the subject, that he understood the ethics of the case as well as I did, and he could do as he pleased about signing what is termed the complaint, or libel. He didn't want to sign the libel. I told him he could do as he pleased about that, that I was not going to ask him not to, that it was left entirely to himself.

Q. When this money was paid by you to Mr. Sutro, what was your understanding with reference to its effect on the claim of the Willamette Navigation Company?

A. It was all one claim. The claims were not distinguished. It was one sum they were obtaining from us. The only reason why the claim was compromised at that figure was because it was suitable for the purpose of the Willamette Navigation Company. It might just as well have been settled on a basis of \$1000, or \$1500, or any other sum, but as that was the amount they would probably have to pay, [151] we assumed that was the reason they named that amount as the compromise. But it was not a compromise of the claim of the Crown-Columbia, it was a compromise of the whole claim under that policy. I understood it so, and I am sure Mr. Sutro understood it so, our general agents understood it and our Eastern Office understood it.

(Testimony of Adam Gilliland.)

The COURT.—Let me see that, please. May I inquire whether the claim of the Crown-Columbia Company exceeded this amount?

Mr. LILLICK.—The Crown-Columbia claim was exactly \$1158.80.

The COURT.—The payment of that in full would hardly be a compromise.

Mr. LILLICK.—It would not be a compromise on that. Of course, we will argue that later. An attorney would not have a right to compromise a claim of \$5000 and odd for \$1158. My contention will be that this was a payment in full of the Crown-Columbia's claim. It is borne out by the proof of loss. The whole theory of my case depends on the statement that this was a payment of the Crown-Columbia's claim, and that the Willamette Pulp & Paper Company's claim is a separate and distinct amount.

The COURT.—Of course, that might be true. If the claim that you say was settled by this was settled in full, it would hardly be regarded as a compromise settlement. However, that is a matter to be taken up later.

Mr. LILLICK.—Yes, that is a matter of argument.

Mr. HENGSTLER.—You may take the witness.

Cross-examination.

Mr. LILLICK.—Q. Mr. Gilliland, I think you said that when [152] the claim was first presented it was for a larger amount; what was that larger amount?

(Testimony of Adam Gilliland.)

A. I could not tell you. I got the figures either from the bookkeeper or some clerk. I remember paying one visit down to the office of the Paper Company on Montgomery street, and they had figures there showing the loss, both to the Crown-Columbia and to the Willamette Pulp & Paper Co., but what the individual items were, or the aggregate, I could not say. I have no knowledge as to where that memorandum is at the present time.

Q. That was before your payment of the amount in April? A. Yes.

Q. About when was it?

A. I suppose in March. That was practically on the basis of our conversations with Mr. Sutro—whatever those figures were.

Q. When did you first hear about the loss from your Northern office?

A. I could not tell, but I suppose it was within a very short period after the accident occurred; it naturally would be.

Q. Would you say within a week?

A. Within a week, I should think, yes.

Q. There is no doubt in your mind, at all, is there, that the Hartford Fire Insurance Company had in hand a definite statement of the \$1158.80 and the \$5621.85 immediately after the loss?

A. How many weeks after the loss, I cannot say, but we had a definite statement and figures written on the typewriter, two sets of figures presented to us, as to what the damage was there.

(Testimony of Adam Gilliland.)

Q. And that had been sent on to your home office, had it not?

A. It may have been, and it may not. I have no recollection of it. I know that papers of any particular importance we forward.

Q. Upon what did you base your answer a few minutes ago to Mr. [153] Hengstler that your home office expressed doubt about the balance of the claim?

A. They expressed doubt about the whole claim. When this was paid, we wired them that we were going to compromise on this figure, and they wired, "For business purposes only," and not on any other understanding would they allow us to do it.

Q. Have you that letter? A. Yes.

Mr. HENGSTLER.—There are a lot of letters here, Mr. Lillick.

Mr. LILLICK.—I want the first letter from the home office covering this loss, in which Mr. Gilliland says they expressed some doubt about this matter.

The COURT.—Gentlemen, for a case where there are no contested facts, it seems to me this is the longest one I have ever had anything to do with.

Mr. HENGSTLER.—The correspondence that has been interjected in the case has taken up all of the time. If Mr. Lillick had served upon me a notice to produce, we would not have had to spend so much time searching out these different letters.

Mr. LILLICK.—Well, your Honor, it has not taken me so very long after I have finally suc-

(Testimony of Adam Gilliland.)

ceeded in getting just what I wanted from the other side.

Mr. HENGSTLER.—I think this is the letter you want.

Mr. LILLICK.—This letter is dated March 20, 1913.

Q. Would you say that this is the first communication you had from your home office on the matter?

A. No. I could not tell that. I have no way of recollecting particular dates, at all. I have not seen that file since it was turned over to the attorneys.

Q. You remembered, however, the talk you had with Mr. Sutro, and about the receipt, and about his being at your office in April? A. Yes. [154]

Q. Are you not able to place the exchange of views had between you and your home office as before that date?

A. Well, I express the general view that I know that at the time the payment was made we got an answer by wire from them saying that the compromise was all right, but it must be done, not conceding any claim, but simply as a business proposition.

Mr. LILLICK.—I offer this letter in evidence as the letter Mr. Hengstler has just handed me. It reads as follows:

Libelant's Exhibit No. 22.

(Letterhead of HARTFORD FIRE INSURANCE
COMPANY.)

“Hartford, March 20, 1913.

“Adam Gilliland,

“Assistant General Agent,

“San Francisco, California.

“Dear Sir:

“Willamette Navigation Company.

“We have for acknowledgment your communication of March 14th confirming your night letter of that date, and enclosing copy of the Standard Marine Insurance Company's policy which is issued in the name of the Willamette Pulp & Paper Company. Our understanding of this matter is that the Willamette Navigation Company owned no cargo on the steamer ‘Ruth’ on January 11th when she beached about a mile below Oregon City, that the cargo of paper consisting of 398,019 pounds was owned by the Willamette Pulp & Paper Company and the Crown-Columbia Company. Our policy as it is issued to the Willamette Navigation Company in no way could be construed to cover paper belonging to the Willamette Pulp & Paper Company, and/or to the Crown-Columbia Paper Company. As our contract is written it insures the Willamette Navigation Company, a Corporation, for account of themselves, and loss if any is payable to the assured.

“In our former letter to you in reference to this [155] matter we inferred that the Standard Marine Insurance Company's policy was written in

(Testimony of Adam Gilliland.)

the name of the Willamette Navigation Company which is our reason for calling your attention to the phraseology of our contract as to prior insurance, and from the papers before us do not see any reason why we should contribute with the Standard Marine Insurance Company for loss above referred to as we are in no way interested in the property belonging to the Willamette Pulp & Paper Company. Furthermore, we are led to believe that the Willamette Navigation Company are not liable to the Crown-Columbia Paper Company for loss in connection with the beaching of the steamer 'Ruth,' for, it is generally conceded that the shipper unless shipping under an insured Bill of Lading, assumes all liability in connection with the marine perils, and the carrier is not liable unless he has issued an insured Bill of Lading

"It is our understanding that General Agent Hewitt is at the present time in Portland and will likely discuss this matter fully with Special Agent Barclay who the undersigned expects to meet in St. Louis the latter part of this month, and at that time we will carefully consider the account of the Crown-Columbia Paper Company who we understand have no insurance on their cargo.

"Very truly yours,

"C. S. TIMBERLAKE,

"General Agent."

(The letter was marked "Libelant's Exhibit 22.")

Q. This shows, does it not, a definite understanding of the situation as early as March 14, 1913?

A. That shows their attitude.

(Testimony of Adam Gilliland.)

Q. It shows a definite understanding that—[156]

The COURT.—It shows what it shows.

Mr. LILLICK.—Very well, your Honor.

Q. Prior to the writing of that letter on March 20, 1913, a full report of this had been sent on to your home office, had it not?

A. I presume it had.

Q. And in that report was a copy of the report that Mr. Honeyman made to your people and forwarded down here?

A. I am just assuming so; I presume it did.

The COURT.—Q. Well, that would be the ordinary course of business, wouldn't it? A. Yes, sir.

Mr. LILLICK.—Q. There is no doubt, is there, Mr. Gilliland, that you knew exactly how much the loss was on that paper within thirty days of the time of the accident?

A. Yes, I think it was within thirty days; I don't know whether it was, or not, but I know it was early after the accident, whether it was within three weeks, four weeks, five weeks or six weeks, I could not say.

Q. You said that Mr. Sutro told you that he did not want to sign the libel; did I understand you correctly? A. Yes.

Q. Mr. Sutro did not sign the libel, did he?

A. I don't know.

Q. I thought you said he wrote you a letter saying that he was delighted with the settlement?

A. He wrote a letter to Mr. Hewett personally.

Q. You have not that letter, have you? A. No.

Mr. COOGAN.—We can get a copy of that letter for you.

Mr. LILLICK.—What date was it, if you remember?

Mr. COOGAN.—A day or so after the payment on April 24. It was a letter that was read to me by Mr. Sutro.

Mr. HENGSTLER.—A copy of it is in Mr. Sutro's files.

Mr. COOGAN.—Yes, and I would be very pleased to get it [157] for you.

Mr. LILLICK.—I am not particularly interested in it, except as to the date, and as to Mr. Gilliland's recollection of that. That is all, Mr. Gilliland.

Mr. HENGSTLER.—If your Honor please, we have one other witness, Mr. Barclay. The only testimony which we expect to adduce from him is purely corroborative of what Mr. Gilliland has testified to. Mr. Barclay was in the same office, the Hartford Fire Insurance Company. It would save time if Mr. Lillick will admit that Mr. Barclay will testify to the same thing.

Mr. LILLICK.—I am quite satisfied to stipulate that he would testify, if sworn, to the same things that Mr. Gilliland has testified to.

Mr. HENGSTLER.—(Addressing Mr. Barclay.) Mr. Barclay, what was your position in the Hartford Fire Insurance Company at the time?

Mr. BARCLAY.—I was special agent for the Marine Department.

Mr. LILLICK.—Mr. Barclay was what they generally refer to as an adjuster.

Mr. BARCLAY.—No, sir.

Mr. LILLICK.—I am not desirous of minimizing the importance of your position, Mr. Barclay, but I was just wondering whether you occupied a position which is referred to frequently as that of adjuster.

Mr. BARCLAY.—No.

Mr. HENGSTLER.—I am uncertain as to one feature; I don't know whether the date when the Standard Company paid the claim of the Libelant has been established. [158]

Mr. LILLICK.—We paid the Willamette Pulp & Paper Company, we did not pay the libelant.

Mr. HENGSTLER.—You paid the Willamette Pulp & Paper Company. You paid them on February 28th, did you not?

The COURT.—That was the date on that paper.

Mr. LILLICK.—Yes, February 28th.

Mr. HENGSTLER.—Now, there is one other thing. Mr. Lillick, you answered the interrogatories that were appended to our answer; I do not know just what the practice is, but your answers can be used as evidence in this case, can't they?

Mr. LILLICK.—I am not sure of that, Mr. Hengstler; I assume they would be taken as admissions, but if there be a variance between the answers and what has been adduced before the Court, it would seem to me there should be something said

now to bring to my attention what may hereafter come as a surprise. What have you in mind?

Mr. HENGSTLER.—I will bring it to your attention and to the Court's attention now. I refer you to this particular answer: It states that the steamer struck the bottom of the river and was beached to prevent her sinking in deep water. That was sworn to by the libelant in the case. That is so inconsistent and directly contradictory of an allegation in your libel, which is also sworn to, and to the evidence of the captain, which has been given under oath, that I want to call your attention to that fact, to that inconsistency. Otherwise, there is no inconsistency in anything else.

Mr. LILLICK.—I don't know the point you have in mind. I should personally say that the captain, being on board at the time, knew better what happened than did my people, who swore to the answer. I think Mr. White, the secretary of the company, [159] verified the interrogatories. They were sent North to be verified by an officer of the company.

Mr. HENGSTLER.—Well, I don't know about that. I know that we waited a year or two before we got a verified answer. There was some difficulty about getting a verified answer to our interrogatories. I think after a year or two we got it.

Mr. LILLICK.—Why do you say there was any difficulty about it when, apparently, Mr. Sutro, who is a charming fellow and absolutely above reproach, expressed himself as being so delighted with the situation, and the whole thing, here, hinges about

a sort of a family affair. I sent the answers as they were drawn from my knowledge gathered by me from the correspondence, and I think Mr. White verified the interrogatories up there and sent them back. They were in accordance with our best information at the time.

Mr. HENGSTLER.—The captain's testimony was taken after that. It is only fair to call your attention to the fact that I am going to make use of that discrepancy. We don't know anything about how this accident occurred. We had to depend entirely upon information furnished by the other side. There are two very different versions of the accident, and I think they are very different in their legal effect. I wanted to be sure that the answers to the interrogatories are considered in evidence in this case. I think that, being a part of the pleadings, they have the same legal force as any other pleading, because they are sworn to.

Mr. LILLICK.—I know of no way by which a mistake of my people could be corrected now. I should think, however, the testimony of the captain would be binding. We will have to leave that to the Court. [160]

Mr. HENGSTLER.—You are in the position of having two witnesses who have sworn to entirely different facts.

Mr. LILLICK.—I was not aware of the difference at all, Mr. Hengstler. The fact, I should take it, would be what the captain testified to. I do not know which will hurt me, but I would say that the

(Testimony of Harry Pinkham.)

captain's testimony is what should be deemed to be correct.

Mr. HENGSTLER.—Of course, it would be assumed that the libelant, after taking this matter into consideration for a long time, would naturally consult with the captain as to what happened, that whoever made the answers to the interrogatories got his information from the captain, that it was not personally to himself.

Mr. LILLICK.—We are discussing a moot question. I simply made the statement that I thought the captain's testimony would be correct.

The COURT.—Is there any further testimony?

Mr. HENGSTLER.—We rest.

Testimony of Harry Pinkham, for Libelant (In Rebuttal).

HARRY PINKHAM, called for libelant in rebuttal, sworn.

Mr. LILLICK.—Q. In January, 1913, what was your connection with the Standard Marine Insurance Company?

A. I am an underwriter, and I am the manager of the marine department of that company.

Q. Had the Standard Marine Insurance Company, in January, 1913, any insurance whatever for the Willamette Navigation Company?

A. No, not on this particular cargo.

Q. Did you have any policies issued in the name of the Willamette Navigation Company at that time?

(Testimony of Harry Pinkham.)

A. We may have had on a [161] hull, but none on cargo.

Cross-examination.

Mr. HENGSTLER.—Q. Mr. Pinkham, you carried insurance, however, on the cargo of the “Ruth” at that time, did you not? A. Yes.

Q. And after the accident happened, you paid your insured a certain sum of money, something over \$5000, did you not?

A. We advanced the assured a certain sum of money in the guise of a loan.

Q. In what form did you make that advance?

A. The receipt is here in evidence, the form we used. It is in the guise of a loan. We advanced that amount of money.

Q. I mean, did you give them the money in gold, or by check, or in what form?

A. I believe we gave it to them by check.

Q. You are the real libelant in this case—I mean your company is.

A. Well, I don’t know just how to answer that; I believe that the Willamette Navigation Company is the libelant, isn’t it?

Q. Formally they are, but if any money should be recovered from the Hartford, you would get the money, wouldn’t you—your company?

Mr. LILLICK.—I submit that is immaterial, your Honor. At the same time, there is no need of gainsaying that under subrogation we had the right to sue.

Mr. HENGSTLER.—Q. Well, it is a fight between two insurance companies, isn't it, Mr. Pinkham?

A. I would say, frankly, yes.

Mr. LILLICK.—We rest.

(Thereupon the cause was submitted upon briefs to be filed within certain times to be agreed upon between respective counsel.) [162]

[Endorsed]: Filed Aug. 2, 1921. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [163]

In the Southern Division of the United States
District Court, for the Northern District of
California, First Division.

IN ADMIRALTY.—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corp.,
Libellant,

vs.

HARTFORD FIRE INSURANCE CO., a Corp.,
Respondent.

IRA S. LILLICK, Esq., Proctor for Libellant,

ANDROS & HENGSTLER, Proctors for Respondent.

**(Opinion and Order to Enter Decree in Favor of
Respondent.)**

I cannot understand why a receipt for the full amount of one claim against respondent should recite that it is in full satisfaction and compromise

settlement of all claims and demands against it for loss or damage by stranding Steamer "Ruth," to the property described under cargo policy No. 304, if it were intended as a settlement only of the single claim. It was certainly no compromise of that claim, and a receipt in full for such claim need not have referred to any other claims or demands at all, if it were intended as a settlement of that claim alone.

A decree will be entered for respondent.

March 6th, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Mar. 6, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [164]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corp.,
Libellant,

vs.

HARTFORD FIRE INSURANCE CO., a Corp.,
Respondent.

Final Decree.

The above cause having come duly on to be heard on the pleadings and proofs, in open court, on the 23d day of June, 1921, and having been submitted

to the Court on briefs, and the Court being fully advised in the premises, and having rendered and filed its decision and opinion herein on the 6th day of March, 1922,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the libel and amended libel filed in the cause be dismissed, and that respondent do have and recover from Willamette Navigation Company, a corporation, libelant herein, the costs incurred in this action, to be taxed herein.

Dated, San Francisco, March 10th, 1922.

M. T. DOOLING,
District Judge.

Approved as to form.

IRA S. LILLICK,
Proctors for Libelant.

[Endorsed]: Filed Mar. 11, 1922. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk.

Entered in Vol. 12 Judg. and Decrees, at page 74.
[165]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

IN ADMIRALTY.—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

Notice of Appeal.

To the Hartford Fire Insurance Co., a Corporation,
and to Messrs. Coogan & O'Connor, and Messrs.
Andros & Hengstler, Proctors for Respondent,
and to W. B. Maling, Clerk of the Southern
Division of the United States District Court
for the Northern District of California.

You and each of you will please take notice that
Willamette Navigation Co., a Corporation, libelant
in the above-entitled cause, hereby appeals to the
United States Circuit Court of Appeals for the
Ninth Circuit from the final decree of the District
Court of the United States for the Northern Dis-
trict of California, entered in said cause on the
11th day of March, 1922.

Dated: May 15, 1922.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Receipt of a copy of the within No-
tice of Appeal is hereby admitted this 15th day of
May, 1922.

COOGAN & O'CONNOR,
ANDROS & HENGSTLER,
Proctors for Respondent.

Filed May 25, 1922. W. B. Maling, Clerk. By
C. M. Taylor, Deputy Clerk. [166]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

Assignment of Errors.

Now comes the Willamette Navigation Co., the libelant in the above-entitled cause, and claims that in the record, opinion, decision, decree and proceedings in the above-entitled cause, in the above-entitled Court, there is manifest and material error, and said libelant now makes, files and presents the following assignments of errors upon which it relies, to wit:

I.

The Court erred in finding and holding that the libel and amended libel of the libelant herein should be dismissed.

II.

The Court erred in awarding costs to respondent.

III.

The Court erred in finding and holding that the receipt given by the libelant to respondent was

intended as a settlement of the claim by libelant against respondent for damaged paper belonging to the Willamette Pulp & Paper Co. [167]

IV.

The Court erred in finding and holding that the receipt given by libelant was intended as a settlement of both claims by libelant against respondent for damaged paper belonging to the Willamette Pulp & Paper Co. and for damaged paper belonging to the Crown-Columbia Paper Co.

V.

The Court erred in not finding and holding that libelant was entitled to recover of respondent the value of the damaged paper belonging to the Willamette Pulp & Paper Co.

VI.

The Court erred in not awarding costs to libelant.

VII.

The Court erred in not finding and holding that the receipt given by libelant to respondent was intended as a settlement only of the claim of libelant against respondent for damaged paper belonging to the Crown-Columbia Paper Co.

VIII.

The Court erred in not finding and holding that the receipt given by libelant to respondent was not intended as a settlement of the claim by libelant against respondent for damaged paper belonging to the Willamette Pulp & Paper Co.

IX.

The Court erred in not finding and holding that the libelant had an insurable interest in the dam-

aged paper belonging to the Willamette Pulp & Paper Co.

X.

The Court erred in not finding and holding that the paper belonging to the Willamette Pulp & Paper Co. was damaged by a peril named in the policy of insurance issued by respondent to libelant covering said paper. [168]

XI.

The Court erred in not finding and holding that proper and sufficient proofs of loss were duly furnished by libelant to respondent.

XII.

The Court erred in not finding and holding that the libelant was entitled to recover the full value of the damaged paper belonging to the Willamette Pulp & Paper Co.

In order that the foregoing assignment of errors may appear of record, said libelant files and presents the same to said Court, and prays such disposition be made thereof as in accordance with the law and statutes of the United States in such case made and provided, and said libelant prays the reversal of the above-mentioned decree, and that such judgment be entered as ought to have been rendered by the Southern Division of the District Court of the United States for the Northern District of California.

Dated: San Francisco, June 15, 1922.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Due service and receipt of a copy of the within assignment of errors is hereby admitted this 15th day of June, 1922.

COOGAN & O'CONNOR,
ANDROS & HENGSTLER,
Proctors for Respondent.

Filed Jun. 15, 1922. W. B. Maling, Clerk. By
C. W. Calbreath, Deputy Clerk. [169]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

IN ADMIRALTY.—No. 15,514.

WILLAMETTE NAVIGATION CO., a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

Stipulation and Order Concerning Original Exhibits.

It is hereby stipulated and agreed between the proctors for the respective parties hereto that all the exhibits introduced in evidence at the hearing of the above-entitled cause before the above Court may be omitted from the apostles on appeal in said cause and may be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the origi-

nal form in which the same were respectively introduced before the said Court upon the trial of the cause.

Dated: May 15, 1922.

COOGAN & O'CONNOR,
ANDROS & HENGSTLER,
Proctors for Appellee.
IRA S. LILLICK,
Proctor for Appellant.

Approved, May 25th, 1922.

M. T. DOOLING,
Judge.

[Endorsed]: Filed May 25, 1922. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.
[170]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 170 pages, numbered from 1 to 170 inclusive, contain a full, true and correct transcript of certain records and proceedings in the case of Willamette Navigation Company, a Corporation, Libelant, vs. Hartford Fire Insurance Company, a Corporation, Respondent, No. 15,514, as the same now remains on file and of record in my office; said transcript having been prepared pursuant to and in accordance with the praecipe for apostles on appeal (copy of

which is embodied herein) and the instructions of the proctor for libelant and appellant herein.

I further certify that the cost for preparing and certifying the foregoing apostles on appeal is the sum of Sixty-five Dollars and Five Cents (\$65.05), and that the same has been paid to me by the proctor for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of July, A. D. 1922.

[Seal]

WALTER B. MALING,
Clerk.

By C. M. Taylor,
Deputy Clerk. [171]

[Endorsed]: No. 3894. United States Circuit Court of Appeals for the Ninth Circuit. Wilamette Navigation Company, a Corporation, Appellant, vs. Hartford Fire Insurance Company, a Corporation, Appellee. Apostles on Appeal. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed July 18, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit. [172]

In the United States Circuit Court of Appeals for
the Ninth Circuit.

IN ADMIRALTY.

WILLAMETTE NAVIGATION CO., a Cor-
poration,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Cor-
poration,

Respondent.

**Stipulation and Order Extending Time to and In-
cluding July 15, 1922, to File Apostles on Ap-
peal.**

It is hereby stipulated and agreed that the time
for printing the record and filing and docketing
this cause on appeal in the United States Circuit
Court of Appeals for the Ninth Circuit may be ex-
tended to and include the 15th day of July, 1922.

Dated: June 14, 1922.

COOGAN & O'CONNOR,
ANDROS & HENGSTLER,
Proctors for Respondent.

It is so ordered.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. 15,514. United States Circuit
Court. Willamette Navigation Company, a Cor-
poration, Libelant, vs. Hartford Fire Insurance
Company, a Corporation, Respondent. Stipulation

and Order Extending Time to File Apostles on Appeal. Filed Jun. 14, 1922. F. D. Monckton, Clerk. Refiled Jul. 18, 1922. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. 15,514.

WILLAMETTE NAVIGATION CO., a Corporation,

Libelant,

vs.

HARTFORD FIRE INSURANCE CO., a Corporation,

Respondent.

Stipulation and Order Extending Time to and Including August 15, 1922, to File Apostles on Appeal.

It is hereby stipulated and agreed that the time for printing the record and filing and docketing this cause on appeal in the United States Circuit Court of Appeals for the Ninth Circuit may be extended to and include the 15th day of August, 1922.

Dated: July 15th, 1922.

IRA S. LILLICK,

Proctor for Libelants.

COOGAN & O'CONNOR,

ANDROS & HENGSTLER,

Proctors for Respondent.

It is so ordered.

W. H. HUNT,
Circuit Judge.

[Endorsed]: In the United States Circuit Court of Appeals, for the Ninth Circuit. No. 15,514. Willamette Navigation Co., a Corporation, Libellant, vs. Hartford Fire Ins. Co., a Corporation, Respondent. Stipulation and Order Extending Time to File Apostles on Appeal. Filed Jul. 15, 1922. F. D. Monckton, Clerk. Refiled Jul. 18, 1922. F. D. Monckton, Clerk.

No. 3894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLAMETTE NAVIGATION COMPANY
(a corporation),

Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY
(a corporation),

Appellee.

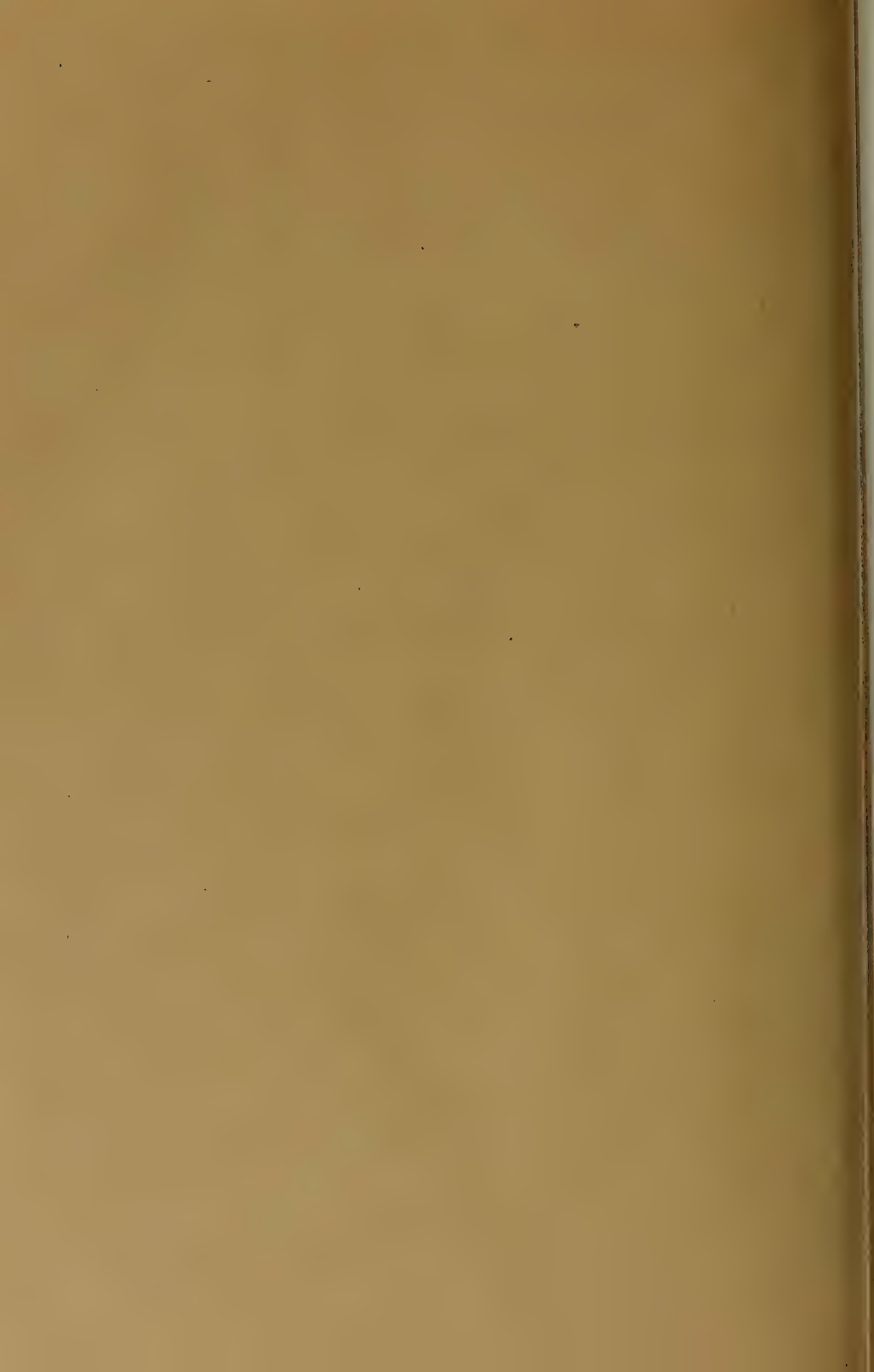
BRIEF FOR APPELLANT.

IRA S. LILLICK,
Proctor for Appellant.

FILED

OCT 10 1922

F. D. MONCKTON,
CLERK.



No. 3894

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WILLAMETTE NAVIGATION COMPANY
(a corporation),

Appellant,

vs.

HARTFORD FIRE INSURANCE COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLANT.

On the 20th day of May, 1912, the respondent (appellee), Hartford Fire Insurance Company, in consideration of a \$1500 premium insured under its open policy the libelant (appellant), Willamette Navigation Company, for the account of itself, loss if any payable to assured, to the amount of \$20,000. The policy, a copy of which is attached to the libel (Apostles page 9), covered paper in rolls and/or bundles and/or packages, and/or merchandise and/or supplies, while on board the steamer "*Ruth*" and/or "*N. R. Lange*", at and from Oregon City, Oregon, to ports and places in the Willamette and/or Columbia rivers and tributaries, and from

Portland, Oregon, and ports and places in the Willamette and/or Columbia rivers and tributaries, to Oregon City, Oregon, direct or via ports and places.

The risks assumed by the respondent Insurance Company were the usual risks in a marine policy, including the perils of the rivers, excepting losses arising from want of ordinary care in handling the cargo or in navigation of the vessel, and the policy also contained the usual sue and labor clause. It was warranted free from particular average but included salvage and general average charges.

The terms of the policy further provided that in case of loss, such loss would be paid thirty days after proof of loss and proof of interest in the lost property was furnished to the respondent Insurance Company; that the Insurance Company, its agent or representative, at or nearest the first port of discharge, should have prompt notice of the loss and should have every opportunity and facility for ascertaining the cause, extent and amount of damage by personal inspection, appraisal or a sale of the damaged property; that no suit or action against the Insurance Company for the recovery of any claim for loss or damage upon, under or by virtue of the policy should be sustained in any court of law or equity unless such suit or action should be commenced within the term of twenty-four months next after the loss or damage had occurred.

The policy further provided that:

“Immediate notice of the occurrence of all losses shall be given to this company by the

insured; and within thirty days from the time the same may happen, the said insured shall deliver to said company as particular an account thereof as the nature of the case will admit, stating the causes if known, the extent thereof, and the nature of the interest of insured in the property; also what other insurance or insurances (if any) there were on said property at the time of said loss, which statement shall be in writing, signed by the insured and verified by his or their oath; and so much of said statement as relates to the cause, nature and extent of said loss or damage shall be verified also by the oath of the master of said boat or vessel, or some other person or persons having immediate charge thereof at the time the same did happen; otherwise this company will not be liable under this policy."

On the 11th day of January, 1913, and within the term of the policy, the steamer "*Ruth*", belonging to the libelant, received on board certain paper in rolls belonging to Willamette Pulp & Paper Company and the Crown Columbia Paper Company at the port of Oregon City, Oregon. On that day the steamer set out on its voyage from the said port to the port of Portland, Oregon, and during the course of the voyage the steamer was stranded and sunk in the Willamette River near the port of Gladstone, Oregon. By reason of the stranding and sinking a part of the paper was damaged and salvage charges were incurred on the paper which was not damaged.

This action is brought against the respondent on the policy by the libelant herein for the value of the damaged rolls of paper belonging to the Willamette

Pulp & Paper Company, the respondent having paid libelant in full for the damaged rolls of paper belonging to the Crown Columbia Paper Company.

Argument.

I.

THE LIBELANT CARRIER HAD AN INSURABLE INTEREST.

It is true that the libelant did not own the paper shipped on the steamer "*Ruth*", but the policy was not limited to cover only such goods as were owned by the assured. The libel alleges and the testimony shows that the paper was placed in the custody and care of libelant. The policy reads that,

"Hartford Fire Insurance Co., Hartford, Connecticut, by this policy of insurance, in consideration of \$1500, does insure Willamette Navigation Co., a corporation, for the account of themselves, loss if any payable to assured to the amount of \$20,000, on paper in rolls and/or bundles and/or packages and/or merchandise and/or supplies, while on board steamer '*Ruth*' and/or '*N. R. Lang*'."

The paper then was delivered to the libelant as a carrier. Its interest in the paper was as bailee for hire and as such it had an insurable interest in its own name and for full value.

The Sidney, 23 Fed. 88;

Phoenix Insurance Co. v. Hamilton, 14 Wall. 504; 20 Law Ed. 729;

Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U. S. 312; 29 Law Ed. 873;

California Insurance Co. v. Union Compress Co., 133 U. S. 387; 33 Law Ed. 730;

Munich Assurance Co. v. Dodwell & Co. (9th Circuit), 128 Fed. 410.

In several of the cases above cited, it appears that the policy was for the "benefit of the owners" or "whom it may concern"; also that the property insured included that held by the assured as trustee, or in which he might have an interest. We are not concerned with a discussion of these matters here, however, as the policy in the present case clearly states for whose benefit the insurance was effected; that is, the libelant herein. There can be no question as to what property it covers for it states specifically that it is paper in rolls, etc. on board the Steamer "*Ruth*". If it had been intended to cover only the interest of the libelant in the paper as owner or for judgments obtained against it by shippers, the policy would have so provided.

The respondent admitted in the lower court that the libelant had an insurable interest in the cargo of paper on board the Steamer "*Ruth*", but it takes the position that libelant cannot recover the value of the paper unless the policy is also expressly for the benefit of the cargo owners; that because the policy does not so provide in the present case, therefore, the libelant carrier cannot collect on the insurance policy unless it can show that it suffered actual damage. In other words, that the carrier is not entitled to collect on the policy of insurance

covering it as bailee unless it proves that the cargo owners have recovered judgment against the carrier for the loss of the goods. But on the other hand, if the cargo owners do recover against the carrier because of bad stowage or other negligence, then the Insurance Company would not be liable to the carrier, because a loss due to the carrier's negligence is an excepted peril under the policy. So by no possibility could an Insurance Company ever be liable to a carrier on a cargo which it held as bailee. Insurance is a gamble, in one sense, but it has been established so long in the business world that it should be conducted honestly and fairly like other business. It should not have as its foundation the principle of "Heads I win, tails you lose." The annual premium of fifteen hundred dollars (\$1500) which the respondent charged the libelant for this policy in no way indicates that the respondent did not consider that there might be some liability under the policy. The extraordinary position which it now takes certainly finds no support in good business morals, and probably not in law, as respondent did not cite a single case to support its contention in the lower court.

In the case of the *California Insurance Co. v. Union Compress Company*, 133 U. S. 387, 33 L. Ed. 730, above cited, the policy covered cotton held by the Compress Company on commission and in trust. In other words, the Compress Company was insured as bailee just as libelants are insured in the present case. The defendant Insurance Company claimed

that only the owners of the cotton were entitled to sue on the policy. In upholding the right of the bailee, the Compress Company, to recover on the policy, the court said on page 736:

“The railroad companies had an insurable interest in the cotton, and to that extent were the owners of the cotton, which was held in trust for them by the plaintiff. Evidence of their ownership of the cotton was admissible. *Home Ins. Co. v. Baltimore Warehouse Co.* 93 U. S. 527, 542 (23: 868, 869).

The policy covered all the cotton which was placed in the hands of the plaintiff by those companies. It was lawful for the plaintiff to insure in its own name goods held in trust by it, and it can recover for their entire value, holding the excess over its own interest in them for the benefit of those who have intrusted the goods to it. *DeForest v. Fulton Fire Ins. Co.* 1 Hall 94; *Home Ins. Co. v. Baltimore Warehouse Co.*, 93 U. S. 527, 543 (23: 868, 869); *Stillwell v. Staples*, 19 N. Y. 401; *Waring v. Indemnity Fire Ins. Co.*, 45 N. Y. 606; *Waters v. Monarch F. & L. Assur. Co.*, 5 El. & Bl. 870; *Siter v. Morris*, 13 Pa. 218; *Johnson v. Campbell*, 120 Mass. 449; *Fire Ins. Asso. v. Merchants & Miners Transp. Co.*, 66 Md. 339; *London & N. W. R. Co. v. Glyn*, 1 El. & Bl. 652; *Phoenix Ins. Co. v. Hamilton*, 81 U. S. 14 Wall, 504, 508 (20: 729, 731).”

As to the contention of the Insurance Company that this liability was contingent upon the liability of the Railroad Companies to the shippers, the court says on page 740:

“(7) The court was requested by the defendant to instruct the jury as follows: ‘As this action is brought solely on behalf of the

railroad companies on account of liability incurred through carelessness of the agents and servants of the companies, no cause of action accrued against the defendant until the actual payment by said companies of damage on account of the alleged fire, and the recovery cannot be greater than the value, on November 14, 1887, at Little Rock, of the cotton so burned and paid for—nor greater than the sum paid by the railroad companies—that is, if they have paid more than the value of the cotton they cannot recover the excess from the defendant; if they have paid less than the value, they can recover only to the extent of the payment.’ The court refused to give that instruction and defendant excepted. This is alleged as error. It is urged that the Memphis & Little Rock Railroad Company has never paid any damages, and that the Missouri Pacific Railroad Company had not paid any when this suit was commenced; and it is contended that no cause of action accrues, in a case of that kind until payment of the damages by the railroad companies is made.

But, as a bailee, under a policy taken out to cover property his own or held by him in trust or on commission, may enforce the contract of insurance to the full value of the property destroyed, holding the proceeds primarily for his own benefit and the balance for that of his bailor, the right of action of the plaintiff accrued on the occurring of the loss. The case cited by the defendant, *Cincinnati, H. & D. R. Co. v. Spratt*, 2 Duvall, 4, does not apply to the present case. * * * But here the plaintiff is the assured. The insurance included the protection of the railroad companies. The premium was paid. The insured property was destroyed by fire. The condition of the liability of the insurer was complete, and its liability had fully accrued. The only question for li-

tigation was whether the railroad companies were protected by the insurance. The defendant is called upon to perform only its agreement to pay the insurance money in case of the destruction of the cotton by fire. Its liability is not dependent upon the question whether the liability of the railroad companies has been discharged; nor is the plaintiff's right of action contingent upon the payment by the railroad companies of the value of the cotton burned, but it is contingent only upon the destruction of the cotton by fire under circumstances which impose a liability upon the railroad companies."

In *Munich Assurance Company v. Dodwell*, 128 Fed. 410, above cited, the policy insured Dodwell & Company

"as well in his or their own names, as in the name and names of all and every other person or persons to whom the subject matter of the policy does, may or shall pertain, in part, or in whole."

It was contended by the Insurance Company that the policy covered only the interest of the insured carrier. The court says on page 411:

"The appellant admits that the policy covers the amount of the general average contribution paid by the appellee on its own goods on board the steamship, but contends that it is not liable under the policy for the amount of the contributions chargeable to the goods of which the appellee was not the owner, for the reason that the latter has no insurable interest therein. It is argued that as a common carrier or bailee the appellee could insure goods in its possession only against a risk which would expose it to loss or liability. There are some expressions

found in the text-books which lend color to this view. Thus, in Gowan on Marine Insurance, 311, it is said: 'The liability for the general average on the policy of insurance cannot be greater than that of the assured on the contract of affreightment.' And in Wood on Fire Insurance, paragraph 294, concerning the insurable interest of a common carrier, it is said: 'But his right to recover beyond the extent of his own interest must depend on the circumstance whether he is liable to the owner for the loss.' "

The court then shows that the cases cited do not sustain the statements made in those texts. Again on page 412:

"After a careful investigation of English and American decisions, we think the true doctrine is that a carrier has an insurable interest in goods in his possession as such, to the full extent of their value, against a loss for which it is possible that he may become responsible, and that the question whether he has the right to recover under the policy is not to be determined after the loss by inquiring whether in fact he is then liable to the owners of the property for the value thereof or for damage thereto."

The respondent attempted to distinguish these cases which were cited by libelant in the lower court, on the ground that in these cases the policies covered other interests besides those of the carrier such as "Who it may concern", etc., but no such distinction can be made, nor do the cases make any such distinction. In the cases cited, the carrier was suing as a bailee just as the libelant in the present case is doing. There can be no doubt that

this policy covers the libelant as a carrier and therefore as a bailee. The question of whether anyone besides the libelant has a right to sue on the policy, is not pertinent to this inquiry, and to put it frankly it is none of the respondent's business whether the libelant is compelled to pay over to the shippers any part of the insurance collected. The amount of respondent's liability is the same whether libelant pays all of the insurance to the shippers or nothing at all. The fact that the cargo owners might have been paid in full for their loss is immaterial as far as the carrier's liability is concerned. Respondent has failed to point out how a carrier would be relieved from liability by a third party paying the loss of the shipper and why in such case the third party would not be subrogated to the rights of the shipper against the carrier.

The rule on this branch of the case is correctly stated in "Joyce on Insurance", page 2018, Par. 925, as follows:

"A carrier has an insurable interest in the goods intrusted to it for carriage that it may insure not only its interest or its liability, but the whole value of the goods; and upon so doing, may collect the whole value, and after reimbursing itself for its special loss, hold the surplus in trust for the owners. And insurance for the benefit of a carrier upon goods in its custody, if not limited to the insurance of its liability or interest, is an insurance of the whole value, and one in which the owner has therefore an interest; and extrinsic evidence is not admissible to control the effect of a policy in this respect by showing that the insurer and insured intended to insure only the interest or liability of carrier."

The libelant had the right to insure for full value and may sue for the proceeds primarily for its own benefit and the balance for that of its bailor. It is unnecessary to allege or prove that the owner of the paper had been paid by the carrier for the loss or even that the carrier is actually liable to the owner for the value of the paper.

II.

THE PAPER WAS DAMAGED BY A PERIL OF THE RIVER.

The agent of the libelant company, Mr. F. G. Wright, who answered the interrogatories attached to the respondent's answer stated that libelant was informed that the Steamer "*Ruth*" struck the bottom of the river and was beached to prevent sinking in deep water. The respondent contended in the lower court this was fatal to libelant's case because it appeared from the libel and the evidence that the vessel was first stranded and then sunk. There is no doubt that the damage was caused by the vessel striking the bottom of the river and just how far they succeeded in getting the vessel up on the beach after she struck the bottom is not very material. Besides Captain Hegdale did not testify that he attempted to keep the vessel off of the beach after she struck the bottom. It was before she struck that he tried to keep her off the beach so that she would not be stranded. He testified that when the vessel was stranded her bow was entirely up on

the bank (Apostles p. 51). The statements of the agent and the Captain are not inconsistent and even if they were, they would in no way injure the libellant's case. The agent did not pretend to have any personal knowledge of the accident and answered the interrogatory only upon his information and belief.

It appears from the Captain's deposition (Cross Exam. Apostles, pp. 47, 48 and 49) that the vessel, proceeding down the Willamette River, arrived at the confluence of that river and the Clackamas River. There was an island just to the south of the junction with the latter river, which formed two channels, the western channel being known as the low water channel, and the eastern channel which was used during the high water period. The water in the Willamette River was very high at that time and the Clackamas River was quite low, and this peculiar combination created an extraordinary condition in the rapid current of the east channel. The Steamer "*Ruth*" was caught in this current, her bow sheered off to starboard, and the current being too strong to back her, or to swing her, bow to port, she hit the east bank and stranded. The following is part of Captain Hegdale's testimony on cross-examination (Apostles pp. 49, 50 and 51).

"Q. Did you ever have anything like a sudden sheer before? A. Oh, yes, I have.

Q. That put her in toward the shore?

A. Yes, sir.

Q. Did she go on the shore before?

A. No; I managed to stop her, until that time.

Q. Have you any explanation of the sheer at this time?

A. Any explanation for the cause of the sheer?

Q. Yes.

A. Well, only the swift current that the steamer was in, and going between the shore and an island, it was necessary to hold towards the shore to stay in the deep water, and the Clackamas River was very low, practically slack; the Willamette River was quite high; and the Columbia River was also very low, creating an unusually strong current, also current and slack water close to the east shore where she stranded. In order to keep her in the deepest water we had to steer a little to the east shore, and when the vessel was in the deepest water she was laying in the edge of an eddy formed on account of the slack water in the Clackamas. Thereby when we strived to get her to back, the current was too strong.

Q. When you started to get her to back?

A. Started to come out.

Q. Oh, to swing her bow out?

A. Swing her bow out.

Q. Out in the main river again?

A. In the main river again.

Q. Yes.

A. The current was so swift she would not answer fast enough to make it. She just sheered in to the shore. The channel is deep right up through to the shore. You can land it anywhere right at the shore on that side where she hit. In fact, the vessel when she stranded, her stern lay in twenty feet of water and her bow was entirely up on the bank."

In the case of the "*Morning Mail*", 17 Fed. 545, the vessel struck a bridge by reason of the drift in the river and cross currents caused by the piers. The court held this to be a "danger of navigation".

This phrase was construed to be synonymous with "perils of the sea" in *Baxter v. Leland*, Fed. Cas. 1124.

In the "*City of Alexandria*", 23 Fed. 826, bales of tobacco were being carried on the lighter when a sudden gust of wind caused the lighter to careen and some of the bales fell into the water. The court decided the loss to be one due to a peril of the sea.

In the case of *Hibernia Insurance Co. v. St. Louis, etc. Transportation Co.*, 120 U. S. 166; 30 Law Ed. 621, the decision of the lower court was affirmed holding that it was a danger of navigation where one vessel struck a sand reef recently formed in the channel and another vessel struck a tree which had fallen into the channel by reason of the bank caving in shortly before the accident.

In *Hostetter v. Park*, 137 U. S. 30; 34 Law Ed. 568, a barge was sunk by some unknown and hidden object below the surface of the water. The court held the loss due to a "danger of navigation".

From the foregoing decisions we are certain that the combination of circumstances encountered by the Steamer "*Ruth*" on the voyage in question may properly be classified as a peril of the river, and that such peril was the direct and approximate cause of the loss.

The respondent claimed in the lower court that the loss was not caused by a peril insured against for the reason that it was caused by the libelant's negligence; that the libelant was negligent because

the burden of proof was on it to show that the loss was not caused by its negligence and that such burden was not met by the libellant. We take issue squarely with respondent, first, in regard to its statement on the burden of proof. The rule of law stated by respondent as applicable to an action on a policy of insurance is diametrically opposed to the general rule of contract law that where a defendant relies upon an exception in a contract for defense, he must bring himself within that exception by a preponderance of the evidence. The following cases cited by respondent in the lower court make no distinction between an insurance policy and other contracts in this regard, and establish no such rule as contended by respondent.

In the case of *Richelieu and Ontario Navigation Co. v. Boston Marine Insurance Co.*, 136 U. S. 408; 34 Law Ed. 398, it appeared from the evidence that the steamer was negligent in navigating with a defective compass and without a lookout and for running full speed in a fog. It was held that the insured could not recover on a policy without showing that the stranding was not caused by the negligence which had already been proved.

In *Western Assurance Co. v. Mohlman*, 83 Fed. 811, the policy provided:

“If a building or any part thereof falls, except as the result of fire, all insurance by this policy on this building or its contents shall immediately cease.”

It was held that that provision was a condition subsequent and in an action upon the policy the

burden was upon the Insurance Company to prove as a defense that the building fell before the fire; that such burden of proof was not changed by an allegation in the complaint that "the fire did not happen by * * * reason of any of the causes excepted in the terms of the policy". The court quotes from the case of *Blasingame v. Insurance Co.*, 75 Cal. 633, as follows:

"One seeking to recover on an insurance policy must aver the loss showing that it occurred by reason of a peril insured against, but he need not aver the performance of conditions subsequent nor negative prohibitive acts, nor deny that the loss occurred from the excepted risks."

The case of *United States v. Atlantic Coast Line Co.*, 224 Fed. 165, involved the proper construction of an exception in a criminal statute describing a certain offense.

In the case of *Western Refrigerating Co. v. American Casualty Insurance Co.*, 51 Fed. 155, the policy covered all direct loss or damage, except that caused by fire or lightning. This is materially different from a policy covering against particular losses. In the latter class of cases the insured need only to bring himself within the terms of the policy by showing that the damage was directly caused by a peril insured against.

Union Insurance Co. v. Smith, 124 U. S. 405; 31 Law Ed. 497. The statement in this case relied upon by respondent as a statement of law is misleading unless it is explained why the court ap-

proved of the instruction given. In that case the Insurance Company objected to the instruction given by the lower court as follows:

“The want of ordinary care at the time of the loss in Lake Erie must be shown by a fair preponderance of the proof on behalf of the defendant for the reason that the defendant sets it up in its special defense in the form of a special answer, and in that respect takes upon itself the establishment of the affirmative of that proposition.”

In answering this objection the upper court points out that the lower court also in its instruction gave the instruction which was quoted in respondent's brief filed in the lower court. The court holds that the two instructions were proper in reference to the subject to which they related.

The case of the *Oceanic Steamship Co. v. Pacific Coast Steamship Co.*, No. 15,171, was not an action upon an insurance policy. It was an action upon a charter party by the owner against the charterer for liens upon the vessel which had attached during the time that the vessel was in the possession of the charterer. The warranty by the charterer did not cover liens which could be insured against under an ordinary marine policy.

The court says, in regard to the failure of the libel to allege that the claim in question could not be covered by insurance, that on account of the peculiar wording of the clause in the charter party the exemption from liability did not fall within the general rule which required that an exception be

pleaded and proved by the defendant. The exemption in that case was so worded as to form an integral part of the clause defining the respondent's liability. In the present case no claim is made that the exemption from liability is any different from that usually provided in policies of insurance and no special circumstances are alleged which would take it out of the operations of the general rule.

Unseaworthiness is always an excepted cause of loss under an insurance policy, but it is well established that the defense of unseaworthiness in such an action is an affirmative defense and must be established by the defendant Insurance Company. This was held in the very recent case of *American Marine Insurance Co. v. Margaret M. Ford Corporation*, (C. C. A.) 269 Fed. 768, where the court said:

“As between the owner and insurer, the burden of proof that a vessel is unseaworthy rests upon the insurer”, citing *Fireman Insurance Co. v. Globe Navigation Co.*, (C. C. A.) 236 Fed. 618, and *Thames Insurance Co. v. Pacific Creosoting Co.*, (C. C. A.) 223 Fed. 561.

This is also the rule in the State courts as appears by the recent case (1921) of *Sears v. Pacific Mutual Life Insurance Co. of California*, 196 Pac. 235. In that case it was held that where an Insurance Company attempts to avoid payment of a policy under an exception in the policy, the burden of proof is upon the Insurance Company to show that the facts of the case are within the exception.

In the present case, there appears in the evidence a full explanation of the circumstances surrounding the stranding, and nothing is left to inference. Consequently there is no occasion for any presumption of negligence. The facts appearing from the evidence certainly do not show that the accident would not have happened if the master of the "*Ruth*" had gone through the east channel of the river instead of the west channel. By the same reasoning, the accident would not have happened if the libelant had shipped the paper by railroad instead of by boat. The test of negligence is not whether after the accident and a review of the facts and events which lead to it, someone would have operated the vessel differently on that occasion. The test is, did the master of the "*Ruth*" take such action as an ordinarily prudent master of a river steamer would take if placed in the same circumstances just prior to the accident? The rule was long ago established in the case of the "*Carl Frederick*", 33 Fed. 589, that

"when the primary cause of disaster is shown to be a peril of the sea, the proofs should be clear that it might have been prevented by the exercise of reasonable skill and diligence. Error of judgment ought not to create a liability unless the error be such as to show incapacity or the want of that degree of professional skill which reasonably may be expected of a master. It must also plainly appear that but for that error the damage would have been avoided or partially mitigated."

The respondent claimed that the master knew that he could have drifted safely through the other

(East) channel, and quoted certain portions of the master's testimony in attempting to support that claim. A more complete reading of the master's testimony shows that the West channel was the one used during the high water periods, and that at the time in question the water in the river was very high; that the high water channel was safer because it was much straighter and wider, and the current was approximately the same as the current in the Eastern channel; that the Eastern channel was too crooked to run at all with the engines going ahead, and that the only way that that channel could be navigated was to drift it. The Eastern channel was used only when the water was too low in the Western channel. This lends no support whatever to respondent's claim that drifting through a channel is the safest method of navigation and therefore should be followed in all channels of swiftly moving current. The fact is that that method was adopted in the Eastern channel because it was the only way possible to get through that channel. It does not necessarily follow that the Eastern channel was safer than the Western channel, nor that the Western channel should have been navigated in the same manner.

The master further testified that prior to the accident in the present case he had had trouble with the same steamer in navigating the Eastern channel, and his steamer was carried around and landed across the channel. He denies that the Western channel could be navigated with greater safety by drifting with the engines reversed, and

testified that the Western channel was straight and therefore could be navigated with much greater safety under the method which he adopted.

The master's testimony brings him well within the rule requiring reasonable skill and diligence and respondent has offered no testimony in rebuttal.

III.

PROOFS OF LOSS WERE FURNISHED TO RESPONDENT.

On February 24, 1913, libelant sent the following letter to the agents of the respondent in Portland, Oregon (Libelant Exhibit 8, Apostles page 137):

"We are advised by Mr. Wm. Pierce Johnson, President of our company and located in San Francisco, that the Hartford Fire Insurance Co. are liable under Cargo Policy #304 for their proportion of the loss of cargo on the Str. 'Ruth' which went aground below the Clackamas Rapids on January 11th, and in accordance with this request we enclose herewith detailed claims amounting to \$5621.85, which he suggests that you forward to San Francisco office for settlement."

This letter was answered by them on February 28, 1913, as follows (Libelant's Exhibit 9, Apostles pages 138 and 139):

"We acknowledge receipt of your letter of the 24th inst. enclosing statement of loss of cargo on the Steamer 'Ruth'. This comes to us as somewhat of a surprise, as we understood from Captain Crowe that this matter had been closed up with the Standard Marine, their policy covering all the loss, inasmuch as it was specific insurance.

The statement that you enclosed is not quite clear. When the loss occurred we sent Mr. W. B. Honeyman to the wreck immediately to superintend salvage operations for the Hartford. He was there two days and returned and informed us that Captain Crowe had been placed in charge by the Standard Marine, the cargo being insured on the Standard Marine specifically.

We do not know the nature or extent of the interest of the Willamette Navigation Company in this cargo and the claims growing out of the loss, consequently are at a great disadvantage in laying the case before the Hartford's home office at Hartford, in fact we are so devoid of information that our position is humiliating. Could you not inform us as to the contracts between yourselves and the Paper Companies on which your claim is based, also the amount and terms of insurance carried on this cargo by other companies, this information will be required before an adjustment can be made.

We are anxious to make a speedy and satisfactory settlement of this claim as it is our business to give the very best service to our clients, but unless we have detailed information you can readily see that our hands are tied.

Trusting that at an early date you will be able to give us the necessary particulars, we are,
Yours very truly,"

Apparently, this last letter did not come to the attention of the libelant in due course for it wrote again on May 1, 1913 to respondent, requesting a reply to its letter of February 24. (Libelant's Exhibit 11, Apostles page 143.) This letter was answered by respondent on May 16, 1913 (Libelant's Exhibit No. 12, Apostles page 144), saying that the

matter had been referred to the Adjuster in San Francisco. On May 22, 1913, respondent again wrote to libelant in reference to another claim amounting to \$1158.80 and requesting that proofs of loss which had been sent to libelant in connection with that claim be executed by libelant and returned to respondent. (Libelant's Exhibit 14, Apostles page 146.) To this letter libelant answered May 26, 1913 (Libelant's Exhibit 15, Apostles page 147), as follows:

"Yours of May 22nd received. We have written to Mr. Johnson in San Francisco today asking that the proof of loss covering the Crown-Columbia Paper Co.'s loss be returned to your San Francisco office as soon as possible. The draft which you refer to amounting to \$1158.00 covers the loss of the Crown-Columbia Paper Co. while our letter of February 24th enclosed copy of claim filed by the Willamette Pulp & Paper Co. for their loss and it is regarding the disposition of this claim that we would like to have your reply."

Respondent answered on June 2, 1913 (Respondent's Exhibit C, Apostles page 149), that the loss had been paid by the Standard Marine Insurance Company and that no claim had been made on the respondent by the libelant for the loss of the paper belonging to the Willamette Pulp & Paper Company.

Libelant's letter of June 3 (Respondent's Exhibit D, Apostles page 151) acknowledges respondent's letter of June 2 and states that the libelant's records show that the claim still stands. On June 13,

1913, the libelant, through its attorney, sent the following letter to respondent at San Francisco (Libelant's Exhibit 1, Apostles page 87):

"Enclosed herewith please find statement of loss of Willamette Pulp & Paper Co., on steamer '*Ruth*', claim for which has been made against the Willamette Navigation Co., which statement I promised to sent you the other day, but which has been delayed on account of a rush of other matters in the office.

I have been unable to make up the formal claim which I told you that I would furnish you the other day, on account of not having at hand a copy of the bill of lading which I desired to attach to it, but this will follow in due course, unless by reason of your settlement of the claim for loss sustained to the shipment of the Crown Columbia Paper Co., you are already in possession of the data necessary to enable you to pass upon the claim, the statement of which I am enclosing.

It was my understanding that formal proof of loss and proof of interest in the property, a statement of which is herewith enclosed, had already been made and from the fact that a representative of your company went out to the vessel where she was stranded immediately after the loss, I assume that you are in full possession of all of the details with reference to a particular account of the loss, with the causes and extent thereof. The Willamette Navigation Co. had no other insurance upon the property insured under the policy at the time of the loss.

In my conversation with you, upon Tuesday, I neglected to mention, what you perhaps already know, that the only cargo on board the '*Ruth*' at the time of the loss was paper in rolls and bundles shipped by the Crown Columbia

Paper Co. and Willamette Pulp & Paper Co., consigned to themselves at Portland.

If there is any further or additional information that you desire, with reference to the claim, the statement of which I am enclosing, kindly let me know and I will see that it is furnished you."

The statements referred to in the above letter are set out on page 172 and following pages of the Apostles and are marked Libelant's Exhibit 20. This letter was acknowledged by respondent on June 17, 1913, and libelant was advised in that letter that the matter had been transmitted to the General Agent of the respondent company at Hartford, Connecticut (Libelant's Exhibit 2, Apostles page 95).

On September 17, 1913, libelant, through its attorney, sent the following letter to respondent at San Francisco (Libelant's Exhibit 4, Apostles page 120).

"Referring to my letter to your Mr. Adam Gilliland, Assistant General Agent, under date of June 13, 1913, and the statement therein made that as soon as I obtained the bills of lading for the paper mentioned in the claim of the Willamette Pulp & Paper Co. against the Willamette Navigation Co. for its shipment on the steamer 'Ruth' I would forward them to you, these bills of lading have just been received and I am forwarding you herewith copies thereof. The originals are subject to your inspection if you so desire.

As stated in my letter above referred to, I believe that you are in full possession of all the details with reference to a particular account of the loss, with causes and extent thereof, as well as the nature of the interest of the

Willamette Navigation Co. in the property, inasmuch as you have paid the Willamette Navigation Co., under your policy No. 304, the damage suffered by the loss of the paper of the Crown Columbia Paper Co. The statement of the loss of the Willamette Pulp & Paper Co., (claim for which has been made against the Willamette Navigation Co.) was sent you in my letter under date of June 13, 1913, and this claim for \$5621.85 is of exactly the same character as that of the Crown Columbia Paper Co., so that you are undoubtedly in possession of all of the information necessary to enable you to pass upon it. Under the terms of your policy, loss is agreed to be paid within thirty days after proof thereof, and we shall be glad to receive payment of this loss within thirty days from the date hereof.

I repeat our offer to furnish you with any further or additional information that you desire with reference to this claim, as well as any further form of proof of loss."

The form of the bills of lading referred to in the above letter is set out on page 126 and following pages of the Apostles. Apparently this letter was never answered.

In addition to the foregoing proofs of loss, it appears from the evidence that respondent had a representative on board the Steamer "*Ruth*" within two days after it had stranded. (Report of Wm B. Honeyman, Libelant's Exhibit 17, Apostles page 153; Libelant's Exhibit 18, Apostles page 155). Also a full report of the loss was made to respondent's branch office on the Pacific Coast and to its home office in Hartford, Connecticut. At no time prior to the filing of the libel in this case did respondent

ever complain or offer any objection to any alleged insufficiency in the form or substance of the proofs of loss offered by libelant, or that they were not given within thirty days from the time of the loss. Respondent expressed surprise that the claim was made because as it said the loss was paid by the Standard Marine Insurance Company, but it requested information in regard to the contracts between libelant and the shippers. (Libelant's Exhibit 9 Apostles page 138.) This request was complied with by forwarding to respondent copies of the bills of lading as soon as they could be obtained by libelant. (Libelant's Exhibit 4, Apostles page 120.) The respondent also claimed that the loss on this policy had been paid by it (Libelant's Exhibit 14, Apostles page 146) and its home office claimed that in no way could the policy be construed to cover paper belonging to the Willamette Pulp & Paper Co. (Libelant's Exhibit 22, Apostles page 189.) The only objection ever made by respondent to the proofs of loss either in regard to the form or to the time of furnishing them was made by their counsel at the trial of this case. This is sufficient to bar respondent from urging any such objection at this time.

The following cases, together with the excerpts taken therefrom, are in point:

Petit v. German Ins. Co., 98 Fed. 800.

"If the defendant, as is alleged, had verbal notice of the loss, further notice would seem to be useless and unnecessary, if the defendant company acted upon it. It is true that the

policy requires that the notice should be in writing, but the defendant company must be held to have waived that stipulation of the contract when it acted promptly upon the verbal notice, and sent its adjusters to the place where the fire occurred to examine into the loss occasioned by the fire. It was, therefore, estopped in requiring a notice of the loss as provided for in the policy of insurance, and as to this objection the demurrer is overruled."

In the case of *Hurt v. Employers' Liability Assur. Corp.* 122 Fed. 828, the plaintiff alleged in his complaint that he had given notice of the accident covered by the policy in suit and thereafter submitted full proofs of loss, which were accepted and held by defendant after their delivery without any objection. The court observes (p. 833) that it is a well settled rule that where defective proofs are furnished within the prescribed time, if the Insurance Company retains them without objection, it thereby waives all objections (citing numerous cases, and then continues):

"As against the claim of the company in this case that all rights of the insured were forfeited and lost by reason of the failure to give notice within 30 days after the accident occurred, and as supporting the doctrine of the Kentucky cases, we may advert to that of the Supreme Court announced in *Insurance Company v. Eggleston*, 96 U. S. 577, 24 L. Ed. 841, 'that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture'. Supplementing this is the view of the Supreme Court of Wisconsin in the case above cited from 82 Wis. 112, 51 N. W.

1122, 33 Am. St. Rep. 29, where it was said that, 'to prevent forfeiture, courts are bound to construe such contracts as strongly against the insurer and as favorably for the insured as their terms will reasonably admit'. So that if, by any possible construction, it could be held that there might have been a forfeiture in this case, we ought still to hold, on the admitted facts, that it has been waived by the 'requirement', the 'receipt', and the 'retention, without objection', of the notice and proofs, averred in the petition to have been given."

Royal Insurance Co. v. Martin, 192 U. S. 154;
48 L. Ed. 385, on p. 389:

"But this company made no demand for proofs on this point. On the contrary, the formal production of such proofs was, in effect, waived; for the company assumed that what occurred in the locality at the time of the fire constituted a riot, which relieved it from all liability. It, therefore, gave notice by its agents that, as the fire and the destruction of the goods were produced by a riot, they were not compelled to pay, and that 'the policy would not be paid'. A general, absolute refusal to pay in any event, or a denial by the company of all liability under its policy, dispensed with such formal proofs as a condition of its liability to be sued, and opened the way for a suit by the assured in order that the rights of the parties could be determined by the courts according to the facts as disclosed by evidence."

Scottish Union & National Ins. Co. v. McKone, 227 Fed. 813, on p. 815:

"The proofs of loss were received by the insurance company and retained, and on September 27, 1913, one James Hopkins, an ad-

juster, acting for the defendant, was sent to the plaintiff, and examined him before a notary public touching the loss sustained by the fire. We think that the receiving of the proofs of loss without objection by the company, and the sending of an adjuster to the insured to examine him in connection with the loss, without any objection being made as to the immediate written notice, constituted a waiver of the requirement of the policy in this respect."

American Marine Ins. Co. v. Margaret M. Ford Corp., 269 Fed. 768 on page 771:

"We think the proof of loss is sufficient. The object of proof of loss is to give information to the insurance company as to the facts rendering it liable. A substantial compliance with the terms of the policy is sufficient. *Globe & Rutgers Ins. v. Prairie Oil & Gas Co.*, 248 Fed. 452, 160 C. C. A. 462. On March 23, 1918, the plaintiff in error advised of the fact that the vessel had been damaged and that extensive repairs were necessary. On March 26, 1918, they were again informed when a copy of a letter addressed to the cargo underwriters was sent to them advising about further loss. A copy of the survey of March 25 and April 9 shows that specifications were sent to them on April 11, and on April 12 formal notice of abandonment of the vessel was sent. Acknowledgment of such a letter was made by the plaintiff in error. All the bids upon the specifications were sent to the plaintiff in error. We think this was sufficient compliance with the terms of the policy as to notification of loss, since it further appears that liability was denied on the ground of unseaworthiness of the vessel by the plaintiff in error. Further proofs of loss were waived after such a position was assumed. *Royal Ins. Co. v. Martin*, 192 U. S. 149, 24 Sup. Ct. 247, 48 L. Ed. 385."

From the long and drawn out correspondence between the libelant and respondent, negotiating for a settlement of this claim, during which time no objection was ever offered by respondent to the proofs of loss made by libelant, we feel fully justified in asserting that respondent itself has no faith in this defense set out in its answer, and that it will not be seriously urged on this appeal. The most that respondent contended for in the lower court, in regard to the proof of loss, was that it had the right to demand that libelant should furnish proof which complied with the requirements of the policy in every respect. We have no quarrel with that contention. The respondent, however, totally ignores the fact that no such demand was made and also ignores the law on the question of waiver. This cannot be construed otherwise than as an admission that libelant's contentions in regard to the proof of loss are correct.

IV.

LIBELANT'S CLAIM HAS NOT BEEN PAID.

The opinion of the learned District Judge leads us to believe that the lower court agreed with the libelant's statements on the law of the case, as set out in the foregoing sections of this brief; but that the court fell into error in making a conclusion of fact from certain undisputed facts concerning a receipt in full, given to the respondent company for all claims by libelant against respondent under the

policy. At the trial, and also in its opinion, the court stated that it could not understand why a receipt for settlement in full of all claims should be given when a larger claim was still held pending, but as the court asked further questions on that point at the trial, we thought that the situation had been made clear to the court. The respondent's contention in the lower court that the written instrument (the receipt) could not be varied by parol evidence further strengthened our belief that this was not the main issue in the case. The consequence was that we did not set out in our brief a recital of the circumstances surrounding the execution of the receipt as fully as they would have been set out had we suspected that they were still not clear to the court. The situation is as follows:

The libelant had two claims against the respondent company for paper damaged on the Steamship "*Ruth*", one for paper belonging to the Crown Columbia Paper Company for \$1158.80, and the other one, the subject of the present suit, the paper belonging to the Willamette Pulp & Paper Company. On February 24, 1913, the libelant, through its office at Oregon City, Oregon, demanded payment of the respondent for the loss on damaged paper belonging to the Willamette Pulp & Paper Company in the sum of \$5,621.84, (Libelant's Exhibit 8, Apostles p. 137). This demand was made upon Henry Hewitt & Co. of Portland, Oregon, who were the agents of the respondent company in that city, (Apostles, p. 138.)

On February 28, 1913, Hewitt & Co. answered that they understood that the claim had been paid by another insurance company and requested additional information. (Libelant's Exhibit 9, Apostles p. 138.)

On March 3, 1913 libelant answered the letter and requested Hewitt & Company to refer the claim to the San Francisco office of the respondent company. (Respondent's Exhibit B, Apostles p. 148.)

On March 11, 1913 Hewitt & Co. advised libelant at Oregon City that they had referred the claim to the San Francisco office of the respondent company. (Libelant's Exhibit 16, Apostles p. 152.)

About this time a claim was made by the San Francisco office of the libelant company on the loss of the paper owned by the Crown Columbia Company, which was referred by the respondent to its home office in Hartford, Conn. The claim made by libelant's Oregon City office on the paper belonging to the Willamette Pulp & Paper Company was also referred by respondent to its home office in Hartford.

On March 20, 1913 respondent's home office advised its San Francisco office (Libelant's Exhibit 22, Apostles p. 189) that there was no liability under the policy for the loss of paper belonging to the Willamette Pulp & Paper Company because the policy insured only the interests of the Willamette Navigation Company in the paper. It expressed a doubt, however, as to its liability on the loss of the

paper owned by the Crown Columbia Company because that company carried no insurance on its paper, and it was stated in the letter that the home office would further consider this claim. Thereafter, the libelant convinced respondent that it had paid the Crown Columbia Company for the loss of its paper and that the respondent company should repay the libelant. (Apostles, p. 108.) As soon as the respondent company indicated a willingness to pay for the loss of the paper belonging to the Crown Columbia Company, libelant, through its San Francisco office attempted to collect that claim through attorney Oscar Sutro. By reason of the fact that respondent still denied liability on the loss of the paper belonging to the Willamette Pulp & Paper Company, and as the latter company had been paid for its loss by the Standard Marine Insurance Company, that claim was not urgent, and no further action was taken on it at that time. It was never referred to Oscar Sutro for collection by the libelant company, as will appear from Mr. Sutro's testimony hereinafter set out.

The respondent tendered a form for the proof of loss on the claim for paper belonging to the Crown Columbia Company, but it was unsatisfactory to libelant, and libelant tendered its own proof of loss, which was accepted by the respondent company. (Apostles, p. 115.) It was dated April 24 although Mr. Sutro testified that it was delivered and accepted several days afterwards. That is not at all material. The point is that it was accepted as satis-

factory by the respondent company. This proof of loss on the claim for the paper belonging to the Crown Columbia Company provides that (Libelant's Exhibit 19, Apostles p. 162):

"The cash value of the property belonging to and owned by the Crown Columbia Paper Company at the time of loss, the loss and damage on the same for which claim is hereby made, the total insurance upon said property, the total claim for loss under the entire insurance on said property and the insurance and claims under this policy upon said property belonging to and owned by the Crown-Columbia Paper Company is * * * \$1158.80.

And the insured hereby claims and agrees to accept from the Hartford Fire Insurance Company by reason of said loss and damage to said property belonging to and owned by said Crown Columbia Paper Company the sum of \$1158.80 in full satisfaction of all liability under said policy for said loss and damage to said property belonging to and owned by said Crown-Columbia Paper Company.

The amount of sound value herein stated does not exceed the cash market value at the time of the said loss of the said property so damaged and so destroyed. The said property belonging to and owned by said Crown-Columbia Paper Company on which this claim for loss is made belonged to and was owned by said Crown-Columbia Paper Company under an agreement with the Willamette Navigation Company, under which the latter company assumed responsibility for marine perils, and under which said last mentioned company has paid said Crown-Columbia Paper Company."

Under date of April 24, 1913 Mr. Sutro, as attorney for libelant, executed and delivered to re-

spondent the following receipt, (Respondent's Exhibit A, Apostles p. 98):

"April 24th, 1913.

"Received of the Hartford Fire Insurance Company, through Palache & Hewett, Genl. Agents at San Francisco, the sum of Eleven Hundred Fifty Eight & 80/100 Dollars, being in full satisfaction and compromise settlement of all claims and demands against the said Company for loss or damage by Fire, Theft, Collision Stranding Str. 'RUTH' which occurred on the 11th day of January, 1913 to the Automobile property described under Cargo Policy No. 304 of said Company.
\$1158.80.

Willamette Navigation Company,
By Oscar Sutro."

The Standard Marine Insurance Company, having paid in the form of a loan the Willamette Pulp & Paper Company for its loss, and thereby having been subrogated to the rights of that company against the carrier, the libelant herein, the libelant became uneasy at this club being held over its head. On May 1, 1913, the Oregon City office of the libelant company made inquiry as to the protection which it rightfully supposed it had under respondent's policy of insurance, and requested the respondent's agents in Portland to answer libelant's letter to them dated February 24, 1913. (Libelant's Exhibit 11, Apostles page 143.) Respondent's agents then answered saying that the matter had been referred to the adjuster in San Francisco. (Libelant's Exhibit 12, Apostles p. 144.) On May 22, 1913, respondent's agents again wrote to libelant

saying that (Libelant's Exhibit 14, Apostles p. 146):

“We are just in receipt of a letter from the San Francisco office of the Hartford Fire Insurance Company which states that on April 24, \$1158.80, the amount of loss under the above mentioned policy, was paid to the Willamette Navigation Company.”

Proofs of loss were also requested. The libelant then called the respondent's attention by letter dated May 26, 1913 (Libelant's Exhibit 15, Apostles p. 147), to the fact that respondent was in error in regard to the payment of the claim; that the payment referred to in its letter covered paper belonging to the Crown Columbia Company, while the claim being made was on paper belonging to the Willamette Pulp & Paper Company. The respondent then abandoned its contention that the latter claim had been paid and took the position that it was not liable because the loss had been paid by the Standard Marine Insurance Company and no claim for that loss had been made by the libelant through its San Francisco office on the respondent company. (Respondent's Exhibit C, Apostles p. 149.) The contention by respondent that this claim had been paid by respondent was revived by respondent's counsel in drawing its answer to the libel in the present case.

The respondent's witness Oscar Sutro testified in part as follows, in reference to the circumstances under which the receipt was given (Apostles, pp. 106, 107, 108, 109, 110, 111, 112, 117, 118 and 119):

“Q. And the two different companies, one was the Crown-Columbia Paper Company, wasn't it? A. Yes.

Q. And that was damaged to the extent of \$1158.80? A. Yes.

Q. There was another consignment belonging to the Willamette Pulp & Paper Company, wasn't there? A. Yes.

Q. And that was damaged to the extent of \$5621.85? A. Yes.

Q. May I put it this way, Mr. Sutro: In executing the receipt which you did upon April 24, 1913, for the payment to the Willamette Navigation Company of that sum, the amount in question is exactly the amount of the shipment belonging to the Crown-Columbia Paper Company?

A. *It was the damage to the Crown-Columbia Paper Company which the Hartford Fire Insurance Company paid to the Willamette Navigation Company.*

Q. And that is the amount that you understood you were being paid, isn't it?

A. *That was the amount that we were being paid. The Willamette Navigation Company paid the Crown-Columbia Paper Company the amount of that loss and the Hartford Fire Insurance Company reimbursed the Willamette Navigation Company for that payment. I am very clear about that. The paper is evidence of it.*

* * * * *

A. It is a proof of loss and was intended to be for the paper which had been shipped by the Crown-Columbia Paper Company, which was damaged, and for which the Willamette Navigation Company paid and for which the Willamette Navigation Company was reimbursed by the Hartford Fire Insurance Company. That was very clear amongst all of us.

* * * * *

Q. Why was this claim pressed to a settlement and a receipt given apparently in full for all claims while a much larger claim was held in abeyance?

A. Because the Willamette Navigation Company considered itself liable to the Crown-Columbia Company for the loss to the Crown-Columbia Paper Company paper, and it did not consider itself liable for the Willamette Pulp & Paper Company for the loss to the Willamette Pulp & Paper Company's paper; the Navigation Company was insured by the Hartford Fire Insurance Company. Whether it had a sound or an unsustainable claim against the Hartford Fire Insurance Company, the Navigation Company did satisfy the Hartford Fire Insurance Company that as it, the Navigation Company, had paid the Crown-Columbia Paper Company, the Hartford Fire Insurance Company should repay the Navigation Company.

* * * * *

A. The Hartford Fire Insurance Company disputed its liability; what finally satisfied the Hartford Fire Insurance Company that as matter of either legal principle or business policy it should pay the claim was the exhibition to the Hartford Fire Insurance Company of a letter that the Crown-Columbia Company had shipped only on condition that the Navigation Company would pay any losses.

* * * * *

The COURT. You have made the difference clear as between the outsiders and the company, but it is not quite clear yet to me why a receipt should be given in full and the Navigation Company still hold a claim nearly five times the amount; was that under discussion between the companies at all?

A. Yes; the Navigation Company considered that it had a claim——

Q. And pressing that claim?

A. For this sum?

Q. For \$5000 odd.

A. Oh, no, it considered that it had a claim for the loss to the Crown-Columbia Company's paper, and that was paid. The Navigation Company did not own the Willamette Pulp & Paper Company's paper, that was owned by the shipper, the paper company, the Willamette Pulp & Paper Company. The Navigation Company would have no claim against its insurer if it, itself, was not liable to its shipper.

* * * * *

The COURT. I still cannot get it into my head why the receipt for settlement in full of all claims for the sinking of the 'Ruth' should be given when you only had in mind about \$1000, and in the background over \$5000.

A. (continuing) Because that was the only money that the Navigation Company considered itself legally liable.

Q. Was this a settlement of a disputed liability, a liability disputed in toto, by which the Insurance Company paid \$1000 because, in good faith, it ought to pay that, or in good morals, rather, because the company had to pay it out of something else? Was that the basis of that whole sum of \$1100—odd?

A. I suppose that is what this lawsuit is about; but to answer your question as best I can, *I don't remember that the Navigation Company ever asserted its claim against the Hartford Fire Insurance Company for the \$5000 amount.*

* * * * *

A. I do not believe that the Willamette Navigation Company asserted any claim against the Hartford Fire Insurance Company prior to the payment of that sum for the loss to the Willamette Pulp & Paper Company's paper. Am I not correct in that?

* * * * *

Redirect Examination.

Mr. HENGSTLER. Q. Mr. Sutro, with reference to that receipt on the 24th of April, as I understand it from your testimony, the situation was this: You had, for the libelant, two claims against the Insurance Company, and there was a controversy about those claims, the Insurance Company denying liability under each one of them, but they finally agreed to pay the smaller one, with the understanding that that should settle the whole indebtedness? Is not that the situation?

Mr. LILLICK. That is objected to as being leading and suggestive.

The COURT. Objection overruled.

A. I am not sure that that is a correct statement of the situation, Doctor; I am not at all sure that the Willamette Navigation Company ever made a claim against the Hartford Fire Insurance Company prior to the date of this payment for more than the damage to the paper of the Crown-Columbia. As I remember the situation, the Willamette Navigation Company considered itself liable to the Crown-Columbia Paper Company for the loss of that paper, and we had either paid that loss or knew that we were going to pay it. I am not sure that we went any further in our claim against the Hartford than the collection of the amount which we either already had paid the Crown-Columbia, or which we knew we were going to pay them. Your question began with the statement that we made two claims against the Hartford—I don't think we ever did at that time.

The COURT. Q. Everybody knew, didn't they, that a much greater damage had occurred than this amount of \$1100?

A. Yes, but the damage was to the paper of the Willamette Pulp & Paper Company.

Q. But if one were covered by the policy, the other would be?

A. Well, not necessarily, as I understood it; Mr. Lillick disagreed with me on that at that time. The policy, according to the contention of the Hartford Fire Insurance Company, covered niether claim, because our bill of lading did not protect our shippers. That was the contention of the Hartford Fire Insurance Company. It was only because we had a special agreement with the Crown-Columbia that, regardless of the terms of the bill of lading, we, as the ship owners, would pay their loss, it was because we had that special agreement to indemnify the Crown-Columbia that we persuaded the Hartford Fire Insurance Company that the portion of the loss which we had made good to the Crown-Columbia should be reimbursed to us. So far as I know, we never did pay the Willamette Pulp & Paper Company anything, and consequently, we could not claim against the Hartford Fire Insurance Company."

These are the facts. They are established by the testimony of respondent's own witness and they are undisputed. Consequently, we say that the court erred in making a deduction of fact from undisputed facts. In this situation the lower court was in no better position to judge whether or not the receipt was given in settlement of the claim for paper belonging to the Willamette Pulp & Paper Company than is this court. The appearance and manner of testifying by the witnesses would give no assistance whatever because the veracity of the witnesses is not in question. There is no conflict in the testimony. It is purely a question of whether or not the undisputed facts will justify the conclusion of the trial court that it was the intention

of the parties to settle all of libelant's claims under the policy for the small sum named in the receipt. The lower court was clearly in error in holding that such was the intention of the parties for the following reasons.

1. The rule that oral evidence cannot be received to alter or vary the terms of a written instrument has no application to receipts. This is the rule of every State in the Union, and it is also the rule of the Federal courts. In *Beall v. Hudson County Water Co.*, 185 Fed. 179, the court said on page 181:

“Receipts are not conclusive; they are not within the inexorable rule prohibiting the introduction of oral evidence to vary or contradict the terms of a written agreement; they may be explained and even contradicted. *Peter v. Beverly*, 35 U. S. 532, 567; 9 L. Ed. 522; *Sutton v. The Albatross*, 2 Wall., Jr., 237; 23 Fed. Cas. 465, No. 13,645; *The Kimball*, 70 U. S. 37; 18 L. Ed. 50; *Atlas S. S. Co. v. Colombian Land Co.*, 102 Fed. 358; 42 C. C. A. 398; *Swain v. Frazier (E. & A.)*, 35 N. J. Eq. 326; *Campbell Mfg. Co. v. Rockaway Pub. Co. (E. & A.)*, 56 N. J. Law 676; 29 Atl. 681; 44 Am. St. Rep. 410; *American Brick Co. v. Drinkhouse*, 59 N. J. Law 462; 36 Atl. 1034; *Taylor v. Wahl*, 72 N. J. Law 10; 60 Atl. 63.”

In *Haas Bros. v. Hamburg-Bremen Fire Ins. Co.* (C. C. A., 9th Circuit), 181 Fed. 916, it was held that the words in a receipt for payment of claims under an insurance policy “in full of all such claims” were not conclusive terms of the receipt and that parol evidence was admissible to show the agreement under which the receipt was executed.

2. Attorney Oscar Sutro was never authorized to collect the claim on the paper belonging to the Willamette Pulp & Paper Company. That claim was made through libelant's Oregon City office and there is no evidence that Mr. Sutro was ever authorized by libelant to collect it or negotiate with the respondent concerning it. Mr. Sutro himself testified that he made no attempt to collect the claim on the paper owned by the Willamette Pulp & Paper Company because he believed that libelant did not have a valid claim for that loss. He testified that he believed libelant company had a valid claim for the paper belonging to the Crown-Columbia Company because the libelant had paid that company for its loss, and therefore libelant had a valid claim against respondent for reimbursement; that it was for that claim on the paper belonging to the Crown-Columbia Paper Company that the Hartford Fire Insurance Company reimbursed the Willamette Navigation Company. There is not a word of testimony in the record that Mr. Sutro ever attempted to collect from respondent libelant's claim on the paper belonging to the Willamette Pulp & Paper Company, or that he even negotiated with respondent company concerning that claim.

3. It conclusively appears from the record that Mr. Sutro had no express authority from the libelant company to collect from respondent company its claim on the paper belonging to the Willamette Pulp & Paper Company, nor did he ever have any such ostensible authority. Even if he were the

general counsel for the company, he would have no authority as such counsel to select such causes of action as he thought the company might have against other parties and negotiate with the third parties concerning such claims or to bring suit upon them. He would have authority to act only on such causes of action as were delegated to him by the company. Even if he had an actual authority to act on any claim which the company might have, he would have no ostensible authority to settle that claim—certainly not to settle claims amounting to about \$6700 for a little over eleven hundred dollars.

Holker v. Parker, 11 U. S. (7 Cranch) 436;

Harper v. National Life Ins. Co. (C. C. A.),
56 Fed. 281;

United States v. Beebe, 180 U. S. 343 at 352.

Of course the attorney's action would be binding in such case if it were subsequently ratified by his client, but no such ratification was claimed in the present case, nor could it be so claimed. It is a fact that the libellant received the money, but it believed, as it had a right to believe, that it was in settlement for the loss of paper belonging to the Crown-Columbia Company. It immediately objected to the draft of the proof of loss proposed by respondent on instructions from its office in Oregon City (Libellant's Exhibit 10, Apostles p. 140) on the ground that in the form as proposed it would prevent libellant from making a claim for paper belonging to the Willamette Pulp & Paper Company.

Also on May 1, 1913, the demand on that claim was renewed by the libelant against respondent (Libelant's Exhibit 11, Apostles p. 143.)

4. Libelant's claim for the paper belonging to the Crown-Columbia Company was for the sum of \$1158.80, and the proof of loss for that claim, accepted by respondent, is for the sum of \$1158.80. The receipt is for the sum of \$1158.80. True the receipt uses the word compromise and it was in fact a compromise of that claim because that claim was disputed. The respondent contended that the policy covered only the interest of the libelant company in the paper. The libelant on the other hand contended that because it was liable to the Crown-Columbia Company for the loss of the paper, and paid the loss, the respondent company should reimburse the libelant. This dispute was settled, and if the parties chose to call it a compromise, they were at liberty to do so. It may have been also that other disputed points were settled. It might be that the libelant waived the interest on its claim against the respondent, or that libelant discovered that the loss on the Crown-Columbia Company claim was much larger than it had at first supposed. There may have been a dozen other reasons for the use of the word compromise in the receipt, but the essential point is that there is no evidence that it included the claim against the respondent for the damaged paper owned by the Willamette Pulp & Paper Company. On the contrary, it affirmatively appears that the receipt was not intended to cover that loss.

5. The receipt was drawn by the respondent company. There is direct testimony to that effect (Apostles p. 183) and the receipt shows on the face of it that one of the company's forms was used and altered to suit the particular purpose. This is evidenced by the fact that the words, "fire", "theft", "collision" and "automobile" are stricken out of the form by having lines drawn through them. In such case the receipt should be construed most strongly against the respondent company and every doubt should be resolved in favor of the libellant.

6. At the time that the receipt was given, on April 24, 1913, the respondent knew that the libellant was asserting two claims against it, one through its office in Oregon City for the paper belonging to the Willamette Pulp & Paper Company, and the other, through Mr. Sutro, for the paper belonging to the Crown-Columbia Company. On the other hand, Mr. Sutro knew only that the libellant was asserting one claim—that of the Crown-Columbia Company, which had been referred to him for collection. He did not know that the libellant company was asserting a claim for the paper belonging to the Willamette Pulp & Paper Company, and in fact he did not believe that libellant had a valid cause of action on that claim. In that situation, the representative of the respondent, with the knowledge which he had regarding the two claims, walked into Mr. Sutro's office with a draft for the amount of the claim due on the paper belonging to the

policy No. 180,617, Buffalo, New York, agency, and in consideration of said payment said policy is hereby cancelled and surrendered to said company, and all further claims by virtue of said policy forever waived.

(Signed) John W. Wickham, Jr.,
Managing Owner.
W. B. Comstock,
per Wickham, Jr.”

There was also a receipt endorsed upon the policy No. 180,617 as follows:

“January 19, 1884.

In consideration of four 47/100 dollars return premium, the receipt of which is hereby acknowledged, this policy is canceled and surrendered to the Fire Insurance Association (Limited) of England.

(Signed) John W. Wickham, Jr.
Managing Owner.
W. B. Comstock,
per Wickham, Jr.’ ”

The plaintiffs then brought suit for the salvage costs and the defendants contended that the claim had been compromised and offered their receipts in evidence in support of that contention. They further contended that as the claim was paid before it was due that was a good consideration for the settlement of all of the claims under the policies, but the court said that it was not unless so intended by both of the parties.

The court first noted that:

“The plaintiffs were never requested to compromise or release their claim for the expense of raising and saving the vessel, nor was the release or compromise of such claim spoken

of except by Wickham when he offered to settle, as hereinbefore stated, which offer was declined by the committee, as above stated, upon the ground that they had no authority to consider the matter."

It was held that:

"The rule is well established that where the facts show clearly a certain sum to be due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue. If there be a bona fide dispute as to the amount due, such dispute may be the subject of a compromise and payment of a certain sum as a satisfaction of the entire claim, but where the larger sum is admitted to be due, or the circumstances of the case show that there was no good reason to doubt that it was due, the release of the whole upon payment of part will not be considered as a compromise, but will be treated as without consideration and void."

"In this case there were two distinct and separate claims of similar amount, namely, \$15,364.78, one of which was for the direct loss and damage to the property insured by the fire, and the other was for the incidental cost of raising the propeller and her cargo. The plaintiffs assumed, upon the face of the receipts, to settle with the defendant for both of these claims by the payment of the exact amount of one of them. In other words, they assumed to settle for a moiety of their entire claim—a claim the legality and justness of which was so far beyond dispute that it could hardly fail to be recognized by the agents of the insurance companies who were present at the meeting in New York. That they intended and supposed they were making a settlement of the plaintiffs' entire claim against them is probably true.

But, aside from the parol testimony given by Wickham of the conversation at the meeting, the admissibility of which is the question in dispute, there was some evidence tending to show that the plaintiff Wickham may have supposed that he was settling only for the direct loss by the fire in the agreement for the survey or appraisement of the damages signed by both parties, which provided that it should not 'apply to or cover any question that may arise for saving boat and cargo'. There were also other circumstances tending to show that the agents of the companies might have known that Wickham supposed he was settling only for the direct loss."

"The appraisement, the letter of Allen transmitting the proofs of loss, and the memorandum of the meeting of the underwriter's agents are all corroborative of the testimony of the plaintiffs that the committee replied to Wickham, when he asked them for a contribution for the expenses of raising and saving the vessel, that the companies were not liable for such expenses, and that they had no authority whatever for considering the claim for raising and saving the steamer. *If this be true, it requires no argument to show that the claim for salvage service was not intended to be included in the receipts.*"

In the case at bar there was no dispute as to the amount due on the smaller claim yet respondent seeks to establish a "compromise settlement" of both claims by paying the extra amount admitted to be due on the smaller claim. Neither is there any doubt that respondent knew that libellant was demanding payment on the larger claim and respondent was refusing payment on the ground that it was not liable.

The answer to the query of the lower court as to why the receipt for settlement in full of all claims should be given, when the larger claim was still pending, is that the respondent at first denied liability on the smaller claim (on paper belonging to the Crown Columbia Company) but was later convinced that it was liable on that claim, and respondent was then willing to pay it. The respondent never admitted any liability for the larger claim (the paper belonging to the Willamette Pulp & Paper Company) and still denies its liability for that claim. Mr. Sutro himself believed that libellant did not have a good cause of action on the larger claim and for that reason there were never any negotiations entered into between Mr. Sutro and respondent for the settlement of the larger claim. There was no occasion for Mr. Sutro's insisting that the larger claim be expressly excepted from the operation of the receipt because he did not know that such a claim was being made by libellant against the respondent. The respondent knew it, however, and if it intended that the receipt should cover the larger claim also, then respondent should have included it in the receipt as the receipt was drawn by the respondent.

CONCLUSION.

Under a contract called a policy of insurance libellant paid to the respondent a sum of money called a premium. In consideration of that premium respondent agreed to pay to libellant a certain

sum of money in the event that certain rolls of paper on board the Steamer "*Ruth*" were lost or damaged by the perils of the river while on a voyage from the port of Oregon City to the port of Portland.

During the life of the policy the Steamer "*Ruth*" while on that voyage with the rolls of paper on board stranded and sunk in the river and the paper was damaged. The respondent is therefore indebted to libelant for the value of the paper unless it can show good and sufficient reason why it should not pay its just obligations.

It is submitted that respondent has not shown good and sufficient reason, nor any reason at all, why it should be permitted to escape liability upon its contract honestly and fairly entered into by the libelant and upon which libelant paid its money in the utmost good faith. Under the law and the evidence as adduced at the trial, the decree of the District Court should be reversed and the cause remanded to ascertain the amount due to libelant under the policy of insurance.

Dated, San Francisco,

October 9, 1922.

Respectfully submitted,

IRA S. LILLICK,

Proctor for Appellant.

United States
Circuit Court of Appeals
For the Ninth Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Defendants in Error.

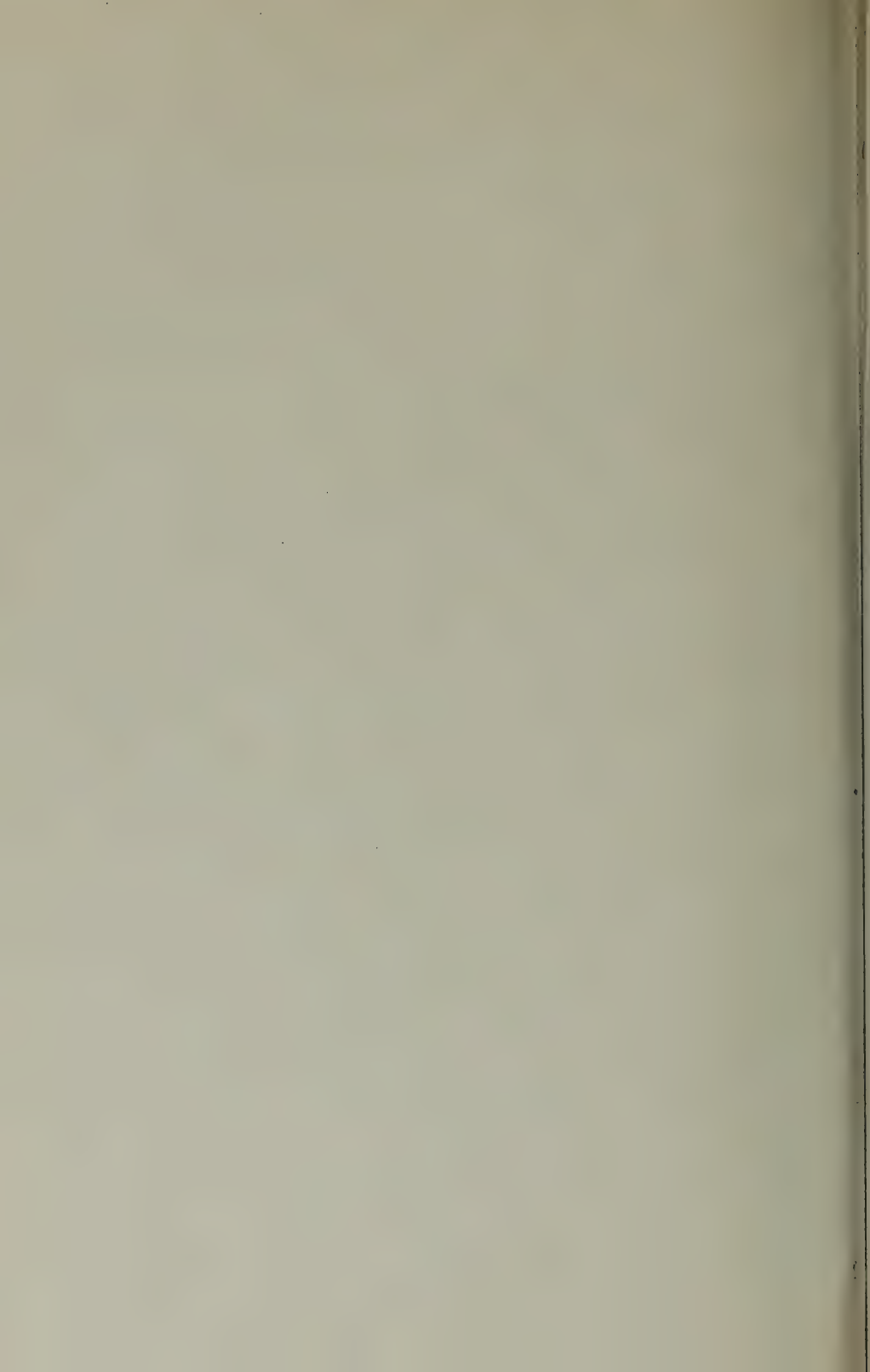
Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.

FILED

AUG 10 1922

F. D. MONCKTON,
CLERK



United States
Circuit Court of Appeals
For the Ninth Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

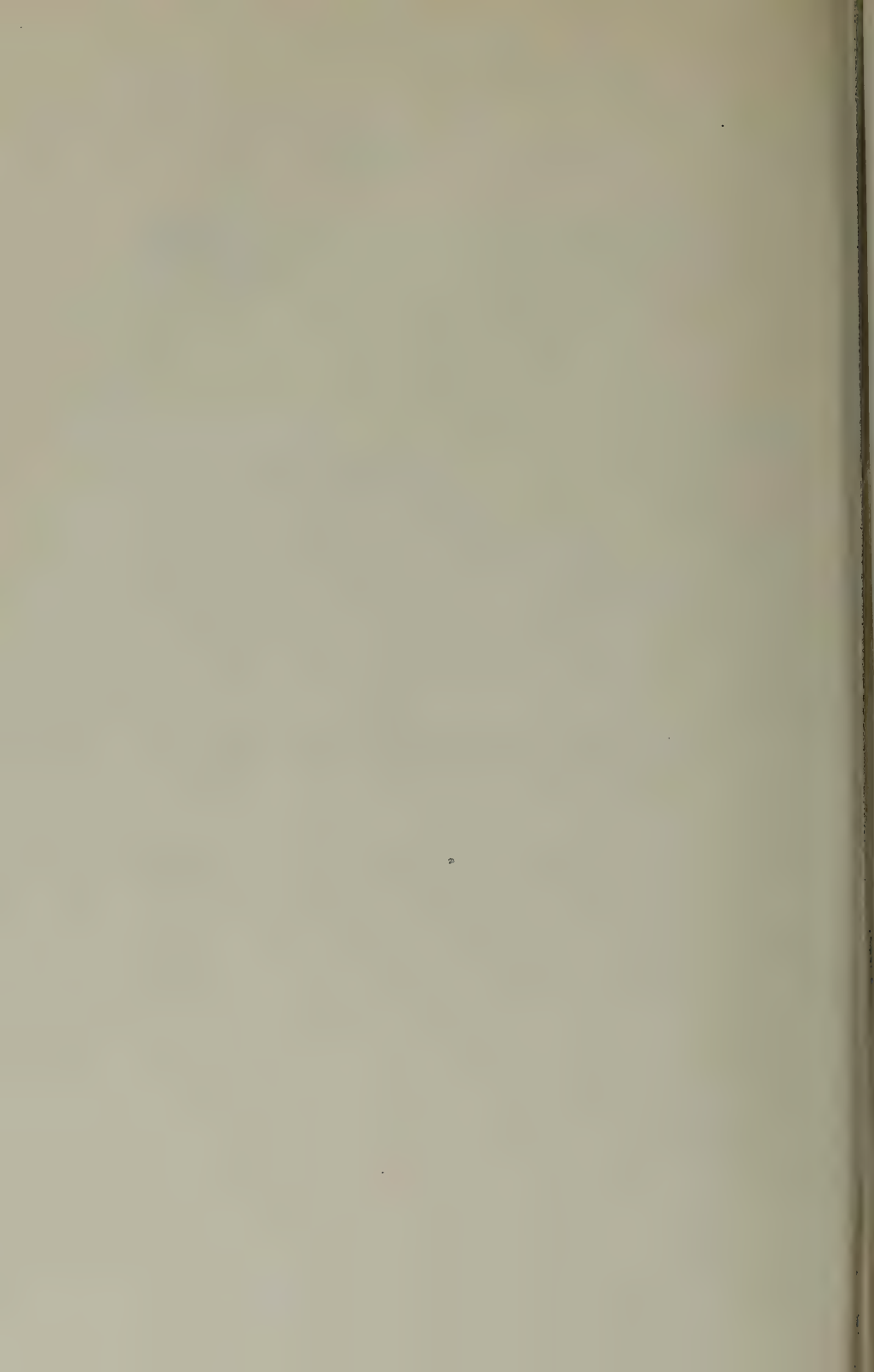
vs.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
United States District Court of the
Northern District of California,
Second Division.



INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Amended Complaint.....	1
Answer of Defendant Kate Nixon to Plaintiffs' Amended Complaint.....	12
Bill of Exceptions.....	37
Certificate of Clerk U. S. District Court to Transcript of Record.....	82
Charge to Jury.....	56
Citation on Writ of Error.....	86
DEPOSITION ON BEHALF OF DEFEND- ANTS:	
ADRIAN, HAROLD A.....	46
Judgment on Verdict.....	26
Notice of Intention to Apply for a Writ of Er- ror, and Refusal of Codefendant to Join..	34
Opinion and Order Denying Motion for a New Trial.....	30
Order for Judgment, etc.....	24
Order Setting Bill of Exceptions.....	66
Return to Writ of Error.....	85
Stipulation and Order Extending Time to File Record and Docket Cause—Dated April 13, 1922	88

Index.	Page
Stipulation and Order Extending Time to File Record and Docket Cause—Dated May 8, 1922	89
Stipulation and Order Extending Time to File Record and Docket Cause—Dated June 7, 1922	91
Stipulation and Order Extending Time to File Record and Docket Cause—Dated July 5, 1922	92
Stipulation Extending Matters Over Term, and Allowing Attention Thereto Outside of California	28
Stipulation Re Bill of Exceptions.....	65
Stipulation That Plaintiffs May File Their Supplemental Complaint, etc.....	23
Supplemental Complaint	21
TESTIMONY ON BEHALF OF PLAINTIFFS:	
JOHNSON, GENEVIEVE (In Rebuttal)	51
Cross-examination	53
TESTIMONY ON BEHALF OF DEFENDANTS:	
NIXON, Mrs.....	38
Cross-examination	41
Redirect Examination	42
Verdict.....	26
Writ of Error.....	83

Names and Addresses of Attorneys of Record.

W. C. CAVITT, Esq., Russ Building, San Francisco, Calif.,

Attorney for Plaintiffs.

H. B. M. MILLER, Esq., 201 Sansome St., San Francisco, Calif.

Attorney for Defendant, Kate I. d'Aleria.

In the Superior Court of the State of California,
in and for the City and County of San Francisco.

CHARLES SHIREY and JENNIE SHIREY,
Husband and Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON,
Sometimes Known as MRS. GEORGE
NIXON,

Defendants.

(Amended Complaint).

Now comes the plaintiffs and files this their amended complaint, by leave of the Court first had and obtained, complains of defendants and alleges:

I.

That at all the times herein mentioned said plaintiffs were, have been continuously and now are husband and wife living and residing together in said city and county of San Francisco.

II.

That at all the times herein mentioned said de-

fendants were in charge of, owned, operated, and had control of that certain automobile commonly known and designated as a Locomobile automobile, and designated by license number 30449, State of Nevada.

III.

That at all the times herein mentioned the said city and county of San Francisco is now and was during all of said time herein mentioned a municipal corporation, duly formed, organized and existing under the constitution and laws of the State of California, and as such municipal corporation said city and county of San Francisco has laid out as a public thoroughfare and dedicated to public use, large numbers of streets, street crossings, courts, [1*] alleys and lanes, in said city and county, among which are streets known and designated as Golden Gate Avenue and Gough Street in said city and county of San Francisco, California, and said Golden Gate Avenue and said Gough Street and the crossings of said last-named streets, is now and were at all of the times herein mentioned in said amended complaint an open, public thoroughfare and dedicated to public use.

IV.

On Sunday morning the 20th day of April, 1919, on or about the hour of 12:30 M. in the night-time, that is to say, between the hour of 12 o'clock and one o'clock at night between Saturday night and Sunday morning, said plaintiffs were riding in a seven-passenger Studebaker automobile, which said

*Page-number appearing at foot of original certified Transcript of Record.

Studebaker automobile, was at all times herein mentioned being driven, was in charge of, owned and operated by one of said plaintiffs, to wit, Charles Shirey, at said time at a slow moderate rate of speed of nine miles per hour, and said Studebaker automobile so operated as aforesaid, was preceding at said time in a northerly direction and near the curb on the easterly side of Gough Street toward Turk Street, and along and over and close to the easterly side of the crossing of Gough Street and Golden Gate Avenue toward Turk Street, at a speed of nine miles per hour at said time and place, in said city and county aforesaid.

V.

On said last-mentioned date, and at the time and place aforementioned, and while said plaintiffs were crossing the crossing of said Gough Street and said Golden Gate Avenue on the easterly side thereof toward Turk Street in a northerly direction as aforesaid, in said city and county of San Francisco, and at the time and place in question said defendants, owned, operated, had control of and were in charge of, and were then and there at the time and place in question, carelessly and negligently operating, [2] driving, had charge of and were in control of that certain passenger automobile known and designated as a Locomobile, at a high and dangerous rate of speed, along, upon and over the crossing of said Gough Street and said Golden Gate Avenue, and were at said time and place proceeding in an easterly direction on said crossing at same time toward Franklin Street, and over the north-

erly side of said crossing of said street and avenue aforesaid in said city and county of San Francisco, California, at same time at a high and dangerous rate of speed, to wit, at a rate of speed in excess of 35 miles per hour, and without giving any notice, signal or warning to plaintiff of the approach of said Locomobile automobile so operated by said defendants as aforesaid.

VI.

That while said plaintiffs were so riding in said Studebaker automobile as aforesaid, and at the time and place in question, and at and past the center of Golden Gate Avenue on said crossing of said Gough Street and Golden Gate Avenue as aforesaid, and approximately within about ten feet from the northerly line of Golden Gate Avenue on the easterly side of said crossing of said street and avenue as aforesaid, and while said plaintiffs were at said time and place in said Studebaker automobile as aforesaid, and were proceeding in a northerly direction and close to the intersection of the curb-line of the curb on the easterly side of said crossing of said Gough Street and said Golden Gate Avenue toward Turk Street, and at the time and place aforesaid, said defendants, at said time and place then and there so carelessly and negligently operated and drove said Locomobile at such a high and dangerous rate of speed as aforesaid, and said Locomobile automobile then and there being operated by said defendants carelessly and negligently at said time and place, without any fault on the part of said plaintiffs, collided with great force and violence with said Studebaker

automobile in which said plaintiffs were then and there at the time and [3] place in question riding in said Studebaker automobile, and at said time and place knocked and threw said plaintiffs out of said Studebaker automobile with great force and violence, and said plaintiffs then and there at the time and place in question struck the hard asphalt street on a concrete base on said crossing of said Gough Street and said Golden Gate Avenue at the time in question with great force and violence, inflicting upon said plaintiff Jennie Shirey the following injuries, to wit:

Severe lacerations on left side of head, contusions and abrasions of left side of face; left axillary space badly discolored, bruised and injured; ecchymosed over left breast; left ilium injured severely; deep multiple contusions of lower left leg; comminuted fracture of left fibula; and of the lower third of said fibula; transverse fracture of left tibia lower third; deep multiple laceration of right leg; deep laceration reaching to the bone of middle third right tibia; severe injury to the left breast; left eye badly discolored; her back is sore and wrenched; that said plaintiff Jennie Shirey struck the hard asphalt street on a concrete base with such great force and violence that she became and was at said time unconscious for more than one hour, and she suffered great, severe and excruciating pain in her head, left ankle, in both lower limbs, left breast, in her back and in her left eye, and she has sustained and suffered great severe physical pain, severe

mental anguish, and a very great severe nervous shock.

VII.

Plaintiff is informed and believes, and upon such information and belief alleges and states the facts to be, that she is now and was at said time permanently injured.

By reason of said injuries so received as aforesaid, plaintiff Jennie Shirey (wife of Charles Shirey) did suffer, and has suffered, and does now suffer, and will continue to suffer great severe physical pain, and great and severe mental anguish, [4] and at all of the times herein mentioned said plaintiff Jennie Shirey has suffered, did suffer, and is now suffering, and continues to suffer from a great and very severe nervous shock, caused by said injuries so received by her as aforesaid.

VIII.

That by reason of said injuries to Jennie Shirey (plaintiff) as aforesaid, it was necessary for plaintiff Charles Shirey to and he did employ a physician and surgeon to treat her said injuries so received as aforesaid, for which he has incurred a reasonable and necessary bill of Five Hundred Dollars (\$500.-00); that by reason of said injuries as aforesaid it was necessary for said plaintiff Jennie Shirey to be confined to a hospital for the period of one week or thereabouts, in which she was furnished nurse hire, medicine and medical supplies, and plaintiff Charles Shirey thereby incurring a reasonable and necessary bill of Forty Dollars (\$40.00), all to his

damage in the sum of Five Hundred and Forty Dollars (\$540.000).

IV.

That before said accident said plaintiff Jennie Shirey was an able-bodied woman; sound in mind and body; made a part of her own clothes and made nearly all of the clothes for the children of herself and husband and living with plaintiffs at the time in question, and when she had anyone employed to assist her in the housework she overlooked the same, and before the accident she did all the housework; and, in fact, was in charge and control of the household, and performed the usual duties that a housewife performs in that behalf; but that since said accident said plaintiff Jennie Shirey has been unable to perform and will never be able to perform, the said duties as aforesaid, to the plaintiff Charles Shirey's damage in the sum of Ten Thousand Dollars (\$10,000).

X.

That by reason of said accident as aforesaid, the said Studebaker automobile owned by said plaintiffs at said time and at the time in question, was broken and completely wrecked, and [5] broken as follows, to wit: Front axle is broken; frame of said automobile is broken and twisted; the whole body is broken and twisted out of shape; springs broken and twisted; one door broken and torn off; top and all bows are broken; the whole top is entirely destroyed; the radiator is broken and twisted out of shape; right front wheel is broken to pieces; the steering gear is broken and twisted; the steering

wheel is broken; two fenders on left side of machine are broken and torn off; running-board on left side is broken and destroyed; right fender is bent and twisted; the hood is bent and broken; the speedometer is broken; one of the tires is punctured and destroyed and damaged; and the engine of said automobile is badly broken and damaged, and the said Studebaker automobile of plaintiffs is completely wrecked and destroyed by reason of said accident as aforesaid and by being struck with such great force and violence by defendants' Locomobile which was operated by said defendants at the time in question, that by reason of said damage to said Studebaker automobile as aforesaid, said plaintiff Charles Shirey was compelled to employ mechanics to repair said automobile so damaged as aforesaid by said defendants, for which he has contracted and incurred an expense of Four Hundred Dollars (\$400.00), which said sum is and was a necessary and reasonable expense to incur to repair the broken parts of said Studebaker automobile, and to repair said Studebaker automobile by reason of said accident as aforesaid; all to his damage in the sum of Four Hundred (\$400.00) Dollars.

XI.

That by reason of said accident, said plaintiff Charles Shirey had one good pair of his trousers torn and completely destroyed of the necessary and reasonable value of Eight (\$8.00) Dollars; his overcoat torn and destroyed, which was and is of the necessary and reasonable value of Twenty-five Dollars (\$25.00); one dress completely destroyed be-

longing to his wife, Jennie Shirey, [6] which was of the necessary and reasonable value of Forty (\$40.00) Dollars, and one derby hat completely destroyed belonging to plaintiff Charles Shirey, of the necessary and reasonable value of Five Dollars (\$5.00); that the whole of said personal property as aforesaid was completely and wholly destroyed by said defendants at the time and place in question, and at the time and place aforesaid, all of which personal property as hereinbefore mentioned was owned and was the property of said plaintiffs, and by reason of said personal property being destroyed by said defendants as aforesaid, said plaintiff Charles Shirey was compelled to and did incur an expense, which was a reasonable and necessary bill of Seventy-three (\$73.00) Dollars; all to his damage in the sum of Seventy-three (\$73.00) Dollars.

XII.

Said municipal corporation, designated and known as the city and county of San Francisco, on the 25th day of March, 1912, by the Board of Supervisors of said city and county of San Francisco, duly passed an act or ordinance known and designated as the "Book of General Orders" of the Board of Supervisors, providing regulations for the government of the city and county of San Francisco, and designated "General Book of Orders as Ordinance No. 1857 (New Series)," and relative to use of streets and regulating moving travel and traffic along, upon and over streets and upon and over all street crossings for all vehicles of every kind, etc., and approved by the Mayor of the city and

county of San Francisco, on the 26th day of March, 1912, and as amended by Ordinance No. 3495 (New Series), which was approved by the Mayor of said city and county, and as amended ever since said time and at the time in question has been continuously and now is in full force and effect, which said ordinance is hereby referred to and made a part of this complaint as if fully set forth herein. That said defendants did not at said time and place, and at the time in question, did not comply with said act and said ordinance as [7] hereinbefore referred to in any manner, or in any respect, and said defendants at said time and place then and there had control of, operated, and were in charge of, and were at the time in question operating and driving said Locomobile automobile, and did then and there carelessly and negligently operate and drive said Locomobile automobile over and across the crossing of Gough Street and said Golden Gate Avenue in an easterly direction toward Franklin Street, and on the wrong side of said crossing of said Gough Street and said Golden Gate Avenue, to wit, on the northerly side of said crossing at a high and dangerous rate of speed, and at a rate of speed greatly in excess of rate of speed as provided in said ordinance as amended, and as provided in sections 1, 2, 3 and 37 of said amended ordinance, which rate of speed as provided in amended ordinance in section 37 thereof in transversing a crossing or intersection of ways at greater speed than fifteen miles per hour on said crossings in a business district or district that is closely built up, and the District at the crossing of

Gough Street and said Golden Gate Avenue is closely built up, and was closely built up at the time in question, and said defendants at the time and place and at the time in question, did drive and operate said automobile upon and over said crossing at said time and place at a rate of speed in excess of 35 miles per hour, contrary to and in violation of said amended ordinance as aforesaid, which said amended ordinance was at the time plaintiff Jennie Shirey received her injuries as aforesaid in full force and effect.

WHEREFORE, plaintiffs pray damages and judgment against the defendants for the sum of Forty-thousand Dollars (\$40,000), and the plaintiff Charles Shirey prays judgment against said defendants for the sum of Eleven Thousand and Thirteen (\$11,013) Dollars, costs of suit, and general relief.

W. C. CAVITT,
Attorney for Plaintiffs. [8]

State of California,
City and County of San Francisco,—ss.

Charles Shirey, being first duly sworn, says that he is one of the plaintiffs named in the within and foregoing complaint, that he has read the within and foregoing amended complaint, and knows the contents thereof, that the same is true of his own personal knowledge, except as to matters therein stated upon his information or belief and as to those matters he believes it to be true.

CHARLES SHIREY.

Subscribed and sworn to before me this 29th day of April, 1919.

[Seal]

A. J. NAGLE.

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Apr. 29, 1919. H. I. Mulcrevy, Clerk. By H. Brunner, Deputy Clerk.

[Endorsed]: No. 16252. In the Southern Division of the U. S. District Court, Northern District of California, Second Division. Charles Shirey et al. vs. Harold A. Adrian et al. Record on Removal. Filed May 29, 1919. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

(Title of Court and Cause.)

Answer of Defendant Kate Nixon to Plaintiffs' Amended Complaint.

Now comes the defendant Kate Nixon and, answering the amended complaint heretofore served and filed herein, admits, alleges and denies as follows, to wit:

I.

As to the paragraph in said amended complaint numbered I, this defendant admits all the allegations therein contained.

II.

As to the paragraph in said amended complaint numbered II, this defendant denies that, at all or any of the times therein stated, or at any time or at

all, the defendants above named owned, or that said defendants or this defendant operated or controlled, the automobile in said paragraph referred to, or any automobile whatever.

III.

As to the paragraph in said amended complaint numbered III, this defendant admits all the allegations therein contained.

IV.

As to the paragraph in said amended complaint numbered IV, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, at the time or place in said paragraph referred to, or at any time or place whatever, or at all, the plaintiff Charles Shirey was driving the Studebaker automobile therein mentioned, or any automobile, at a slow or moderate rate of speed, or at any rate of speed, less than thirty-five miles per hour. [10]

V.

As to the paragraph in said amended complaint numbered V, this defendant denies that, at the time or place herein mentioned, or at any time or place whatever or at all, the defendants above-named owned, or that said defendants or this defendant operated or had control of, or were in charge of, or were then or there or at any time whatever or at all carelessly or negligently or otherwise or at all operating or driving, the automobile in said paragraph referred to, or any automobile whatever or at all, either at a high or

dangerous rate of speed or otherwise, along or upon any street or highway or elsewhere or in any direction whatever or at all, either as in said amended complaint alleged or otherwise.

VI.

As to the paragraph in said amended complaint numbered VI, this defendant denies that, at the time or place in said paragraph mentioned, or at any time or place whatever or at all, either under the circumstances in said paragraph stated or otherwise, while plaintiffs were proceeding as there alleged or otherwise, the defendants above named were, or this defendant was, carelessly or negligently, or otherwise or at all, driving or operating any automobile whatever, or that, without fault on the part of plaintiffs, or otherwise or at all, any automobile being driven or operated by these defendants or by this defendant collided with great or any force or violence, or at all, with any automobile in which plaintiffs were, or either of them was, riding; and this defendant denies that, by reason of any collision between any automobile in which the plaintiffs were, or either of them was, riding and any automobile in which these defendants were or this defendant was riding, the plaintiffs were, or either of them was, knocked or thrown out of any automobile in which they were, or either of them was, riding upon the street or elsewhere; and [11] this defendant denies that, by reason of any acts or omissions of any kind or character upon the part of the defendants herein, or of this

defendant, the plaintiff Jennie Shirey was injured as in paragraph VI of said amended complaint alleged, or otherwise or at all; and, on information and belief, this defendant denies that the plaintiff Jennie Shirey was at all injured as in said amended complaint alleged, or otherwise.

VII.

As to the paragraph in said amended complaint numbered VII, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, by reason of any injuries received by the plaintiff Jennie Shirey, either as in said amended complaint alleged or otherwise, she has suffered or does now suffer or will continue to suffer great or any physical pain or great or any mental or nervous or other shock.

VIII.

As to the paragraph in said amended complaint numbered VIII, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, by reason of any injuries received by the plaintiff Jennie Shirey, or alleged to have been received by her, either as in said amended complaint stated or otherwise, or by reason of any matter, fact or thing whatsoever, the plaintiff Charles Shirey has been compelled to employ, or has employed, a physician or surgeon or nurse,

or has been compelled to procure, or has procured, any medicine or medical supplies, either of the total value of the sum of \$540.00 or of the value of any sum whatever, or at all.

IX.

As to the paragraph in said amended complaint numbered IX, this defendant has no knowledge, information or belief sufficient [12] to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that, prior to the accident in the amended complaint referred to, the plaintiff Jennie Shirey was an able-bodied woman, or was sound in mind or body, or made her own clothes, or nearly all or any of the clothes of her children, or assisted in the housework, or overlooked the same, or had charge or control of the household, or performed the usual or any duties that a housewife performs; and, on the same ground, this defendant denies that, since said accident, the plaintiff Jennie Shirey has been or now is unable to perform such or any work, or that she will never be able to perform such work or any work, either to the damage of the plaintiff Charles Shirey in the sum of \$10,000.00 or to his damage in any sum whatever or at all.

X.

As to the paragraph in said amended complaint numbered X, this defendant has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that plain-

tiffs' automobile was injured or damaged, as in the said paragraph referred to, or otherwise or at all; and, on the same ground, this defendant denies that the plaintiff Charles Shirey was compelled to, or did, employ mechanics or anyone to repair said automobile at an expense of \$400.00 or at any expense whatever or at all.

XI.

As to the paragraph in said amended complaint numbered XI, this defendant alleges that she has no knowledge, information or belief sufficient to enable her to answer the allegations therein contained, and therefore and upon that ground she denies that the clothes of the plaintiffs in said paragraph mentioned, or any clothes, or anything whatever of said plaintiffs, or of either of them, was damaged, as in said paragraph stated, or otherwise or at [13] all, on the same ground, denies that the necessary or any reasonable or other value of any of the things in said paragraph described was or is the sum of \$73.00, or any sum whatever or at all.

XII.

As to the paragraph in said amended complaint numbered XII, this defendant denies that the defendants above named did not, or that this defendant did not, at the time and place in said paragraph mentioned, or at any time or place whatever or at all, comply with the ordinance in said paragraph referred to, or any ordinance whatever, and this defendant denies that these defend-

ants or this defendant carelessly or negligently, or otherwise or at all, operated or drove the automobile in said paragraph mentioned, or any automobile whatever, along or upon Gough Street or elsewhere on the wrong or any side thereof, at an excessive or any rate of speed.

And, for a SECOND and separate answer and defense to said amended complaint, this defendant alleges that she is informed and believes, and on such information and belief so states the fact to be, that the accident in said amended complaint referred to, and the injuries and damages therein mentioned, if any injuries or damages were caused, were caused solely and only by and through the carelessness and negligence of the plaintiff Charles Shirey, and not by or through any carelessness or negligence on the part of these defendants or of either of them, and that the carelessness and negligence of the said plaintiff Charles Shirey consisted in this:

1. That the said plaintiff Charles Shirey was driving his automobile in said amended complaint referred to at a high and excessive rate of speed, running in excess of thirty-five miles per hour in violation of the provisions of the ordinance referred to in paragraph XII in plaintiffs' amended complaint, and in violation of the general laws of the State of California, and in so doing [14] collided with an automobile being operated and driven by the defendant Adrian, in which said automobile this defendant was not riding, and of which

she, at the time of said accident, did not have any charge or control.

2. That, at the time of the accident in said amended complaint referred to, the automobile being driven by the defendant Adrian reached the intersection of Gough Street prior to the time the plaintiff Charles Shirey reached Golden Gate Avenue driving southerly along said Gough Street; and, instead of stopping his said Studebaker automobile and allowing the said Adrian to pass in front of it, he, the said Charles Shirey, carelessly and negligently endeavored to drive in front of the said Adrian; and that any accident which happened, and any injuries and damages which were caused or incurred by reason of the collision in said amended complaint referred to, was solely and only the result of the accident caused by the said plaintiff Charles Shirey as aforesaid.

For a THIRD and separate answer and defense to said amended complaint, this defendant alleges:

1. That, at the time of the accident in said amended complaint referred to, this defendant was not riding in, and did not have charge or control of, the Locomobile automobile in said amended complaint referred to, but the same was being used by the defendant Adrian for the purpose of taking a pleasure ride with a friend without the knowledge or consent of this defendant and in violation of instructions given to him by this defendant to take the said automobile to the garage where the same was kept by this defendant.

2. That the defendant, Adrian, at the time of said accident was not, and never had been, in the employ of this defendant as her chauffeur, and, on the evening that said accident happened, the Locomobile automobile in said amended complaint referred to was delivered to said Adrian by this [15] defendant solely and only for the purpose of having him take the same to the garage where it was kept by this defendant, and with specific instructions that he take the same there and leave it there.

3. That, at the time of the accident in said amended complaint referred to, said automobile of this defendant was not being taken by the defendant Adrian to the garage where it was kept by this defendant, but was being used by him solely and only for his own personal purpose, and not in connection with any business or affairs of any kind or character of this defendant, but in direct violation of specific instructions given to him by this defendant.

WHEREFORE this defendant prays that this action be dismissed as against her, and that she be granted her costs and disbursements herein.

MILLER, THORNTON, MILLER and WATT,

Attorneys for Defendant Kate Nixon..

State of California,

City and County of San Francisco.—ss.

Kate Nixon, being first duly sworn, deposes and says:

That she is one of the defendants named in the

foregoing answer; that she has read said answer and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters therein stated upon her information or belief, and that, as to those matters, she believes it to be true.

KATE I. NIXON.

Subscribed and sworn to before me this 19th day of August, 1919.

[Seal] JOHN E. MANDERS,
Notary Public in and for the City and County of
San Francisco, State of California. [16]

Receipt of a copy of the within answer is hereby admitted this 20th day of August, 1919.

W. C. CAVITT,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 21, 1919. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [17]

(Title of Court and Cause.)

Supplemental Complaint.

Now come the plaintiffs in the above-entitled action, and by leave of the Court first had and obtained, and by stipulation, files this their supplemental complaint herein, and alleges:

I.

That since the filing of the complaint herein the following facts in reference to the cause of action stated in said complaint and affecting said cause of action have arisen:

That the above-named defendants have since the commencement of the action have intermarried, and that the defendant sued herein as Harold A. Adrian is not his true and correct name, but plaintiffs allege that his true name is and was at the time of the commencement this action as follows, to wit: "Armand d'Aleria," sometimes known as Count d'Aleria.

II.

That Armand d'Aleria, sometimes known as Harold A. Adrian and Kate I. Nixon, one of the defendants herein, intermarried in the city of San Diego, county of San Diego, State of California, on the 26th day of January, 1920, and ever since said last-mentioned date have been and now are husband and wife, and that their true legal names now are and they are known as Armand d'Aleria and Kate I. d'Aleria, commonly called Count and Countess d'Aleria.

WHEREFORE, PLAINTIFFS pray judgment as asked for in the original complaint herein, that the names of Armand d'Aleria and Kate I. d'Aleria be substituted in the original action in place and stead of Harold A. Adrian and Kate I. Nixon as the true and correct names of both of the defendants herein, and for such additional relief as to the Court may seem just and equitable in [18] the premise, and costs herein.

Attorney for Plaintiffs.

State of California,
City and County of San Francisco,—ss.

Charles Shirey, being first duly sworn, says:
That he is one of the plaintiffs named in the within
and foregoing supplemental complaint, that he has
read the same and knows the contents thereof,
that the same is true of his own personal knowl-
edge except as to matters therein stated on his in-
formation or belief and as to those matters he be-
lieves it to be true.

CHARLES SHIREY.

Subscribed and sworn to before me this 28th day
of November, 1921.

[Seal]

RAY S. FEDER,

Notary Public in and for the City and County of
San Francisco, State of California. [19]

(Title of Court and Cause.)

**(Stipulation That Plaintiffs may File Their
Supplemental Complaint, etc.)**

IT IS HEREBY STIPULATED, agreed and con-
sented to by and between the respective parties
hereto as the defendants herein, that the plaintiffs
herein may file their supplemental complaint in the
above-entitled action annexed thereto.

Dated this 28th day of November, 1921.

MILLER, THORNTON, WATT and MILLER,

MILLER, THORNTON and MILLER,

Attorneys for Defendants.

Approved Nov. 29, 1921.

FRANK H. RUDKIN.

Rec'd a copy of within supplemental complaint and stipulation this 28th day of November 1921.

MILLER, THORNTON, WATT & MILLER,

MILLER, THORNTON & MILLER,

Attys. for Dfts.

[Endorsed]: Filed Nov. 29, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [20]

At a stated term, to wit, the November term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Wednesday, the 21st day of December, in the year of our Lord one thousand nine hundred and twenty-one.

Present: The Honorable FRANK H. RUDKIN, District Judge for the Eastern District of Washington, designated to hold and holding this Court.

No. 16,252.

CHARLES SHIREY et al.

vs.

HAROLD A. ADRIAN et al.

(Order for Judgment, etc.)

The parties and the jury being present as heretofore the trial hereof was resumed. Genevieve Johnson and John Neff were sworn and testified on

behalf of plaintiffs in rebuttal and Jennie Shirey and James Shirey were recalled and further testified on behalf of plaintiffs in rebuttal. Mrs. Kate I. d'Aleria was recalled and testified on behalf of defendants in surrebuttal. The evidence being closed, counsel made their arguments to the Court and jury, at the conclusion of which the Court having instructed the jury, the jury, at 11:20 o'clock A. M., retired to deliberate upon their verdict. At 11:45 o'clock A. M. the jury returned into court and being asked if they had agreed upon their verdict, replied in the affirmative and returned the following verdict, which said verdict was ordered recorded, namely: "We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey\$10,000.00
2. For plaintiff Charles Shirey for lost
services of wife and expenses.....\$2,000.00

Total.....\$12,000.00

JAS. W. HARRIS,

Foreman. [21]

Ordered that the jury be discharged from further consideration hereof. Further ordered that judgment be entered herein in accordance with said verdict and for costs against Armand d'Aleria and Kate I. d'Aleria, defendants, substituted in place and stead of Harold A. Adrian and Kate I. Nixon. Further ordered that defendants have to stay execution for a period of thirty (30) days. [22]

(Title of Court and Cause.)

Verdict.

We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey\$10,000.00
2. For plaintiff Charles Shirey for lost
services of wife and expenses...\$2,000.00

Total ...\$12,000.00

JAS. W. HARRIS,

Foreman.

[Endorsed]: Filed Dec. 21, 1921. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

(Title of Court and Cause.)

Judgment on Verdict.

This cause having come on regularly for trial upon the 20th day of December, 1921, being a day in the November, 1921, term of said court, before the Court and a jury of twelve men duly impaneled and sworn to try the issues joined herein; W. C. Cavitt, Esq., appearing as attorney for plaintiffs and H. B. M. Miller, Esq., appearing as attorney for defendant, Kate I. d'Aleria; and the trial having been proceeded with on the 21st day of December, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions

of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict which was ordered recorded, namely: "We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey \$10,000.00
2. For plaintiff Charles Shirey for lost
services of wife and expenses \$2,000.00

Total....\$12,000.00

JAS. W. HARRIS,

— Foreman."

and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Charles Shirey and Jennie Shirey, husband and wife, plaintiffs, do have and recover of and from Armand d'Aleria and Kate I. d'Aleria, defendants, the sum of Twelve Thousand and no/100 (\$12,000.00) Dollars, together with their costs herein expended taxed at \$64.70.

Judgment entered December 21, 1921.

WALTER B. MALING,

Clerk. [24]

In the United States District Court, Northern
Division of California, Second Division.

CHARLES SHIREY and JENNIE SHIREY,
His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also
Known as Mrs. GEORGE NIXON,

Defendants.

**(Stipulation Extending Matters Over Term, and
Allowing Attention Thereto Outside of Cali-
fornia..)**

IT IS HEREBY STIPULATED by and between the parties to the above-entitled cause that any and all steps, actions or proceedings taken, or which may hereafter be taken by the defendants above named, or either of them, with a view to obtaining a new trial of said cause, or in the preparation of a bill of exceptions therein, or for the purpose of suing out a writ of error therein, to the United States Circuit Court of Appeals, or for the purpose of taking appeal from the judgment heretofore made and entered herein, or for the doing of any of the things necessary to be done for the accomplishment of any of such objects, may be taken after the present term of said court with the same force and effect as if taken during the present term.

It is also further stipulated by and between the parties to the above-entitled cause that the Honorable Frank H. Rudkin, Judge of the United States District Court at Spokane, Washington, before

whom said cause was tried, may pass upon, settle, deal with and decide in his said district and outside of the Northern Division of California, Second Division, any petition for a new trial, any bill of exceptions, any application for a writ of error to the United States Circuit Court of Appeals, and any appeal to said Court that [25] may be hereafter made, applied for or taken by the defendants above named, or either of them, with the same force and effect as if such matters or things were passed upon, settled and decided by said Judge in the Northern Division of California, Second Division, and that for that purpose any and all papers and proceedings that it may be necessary for him to have before him in so doing may be forwarded to him by the Clerk of this Court at Spokane, Washington.

Dated, this 28th day of December, 1921.

W. C. CAVITT,

Attorney for Plaintiff.

MILLER, THORNTON, MILLER

and WATT,

MILLER, THORNTON and MILLER,

Attorneys for Defendant.

Good cause appearing to me therefore, it is so ordered.

Dated, this 28th day of December, 1921.

(Sgd.) FRANK H. RUDKIN,

District Judge.

[Endorsed]: Filed Dec. 28, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

(Title of Court and Cause.)

(Opinion and Order Denying Motion for a New Trial.)

W. C. CAVITT, Esq., Attorney for Plaintiff.

MILLER, THORNTON, MILLER & WATT, Attorneys for the Defendant Mrs. Nixon.

RUDKIN, District Judge:

This was an action to recover damages for injuries to person and property resulting from a collision between two automobiles. The automobile causing the injuries was owned by the defendant Nixon but at the time of the accident was driven by the defendant Adrian. The jury returned a verdict in favor of the plaintiffs and against both defendants. The defendant Nixon has moved for a new trial on the following grounds:

1. Excessive damages appearing to have been given under the influence of passion or prejudice;
2. Insufficiency of the evidence to justify the verdict;
3. That the verdict is against law.
4. Error of law occurring at the trial and excepted to at the time.

The injuries to the plaintiff Jennie Shirey were serious and permanent and it cannot be said as a matter of law that the verdict was excessive or was influenced by passion or prejudice.

The other three grounds of the motion may be considered together, because unless the jury was

warranted in finding that the act causing the injuries was committed by the defendant Adrian within the scope of his employment and in the line of his duty as agent for the defendant Nixon, there was no evidence to justify the verdict; the verdict was against the law as laid down by the Court in its charge to the jury, and the Court should have directed a verdict in favor of the moving defendant. There [27] was little or no conflict in the testimony. According to the testimony of defendant Nixon, prior to the accident the two defendants had made a call on a friend and upon their return to the St. Francis hotel she left the car and directed the defendant Adrian to take it directly to the Class A Garage, on Post Street. According to the testimony of the defendant Adrian he was directed to take the car to the garage but informed the defendant Nixon that he would first go to Market Street to see a music publisher. He then drove the car to the Pantages Theater, on Market Street, and thence to Turk Street, on his way to Golden Gate Avenue for a detour, or a little ride. There he picked up a friend who asked him to drive him to the Fairmont Hotel, and on the way to the hotel the accident in question happened. The sole question in the case is, therefore, was the defendant Adrian acting within the scope of his authority and in the line of duty when the accident happened. The rule on this subject is thus stated by the Supreme Court of Connecticut in the well-considered case of *Ritchie vs. Waller*, 63 Conn. 155.

“Whether, then, the act of a servant, for which it is sought in a particular case to hold the master responsible, was done in the execution of the master’s business within the scope of the employment, or not, must, from the nature of things, in most cases be a question of fact, to be determined as such by the jury or other trier, because no general rule of law has been, or probably can be, laid down, the application of which will determine the matter in all cases. Sometimes, however, this question is determined by the court as a matter of law. But in by far the greater number of cases where the question of the master’s responsibility turns, as in the present case, principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, it has [28] been generally held to be one of fact and not of law. In such cases it is, and must usually remain, a question depending upon the degree of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the Court may and often will, as a matter of law, determine that the servant was still executing his master’s business. So, too, where the deviation is very marked and unusual, the Court in like manner may determine that the servant was not on the master’s business at all, but on his own. Cases falling between these extremes will be regarded as involving

merely a question of fact, to be left to the jury or other trier of such questions."

Again the Court said:

"In cases of deviation the authorities are clearly to the effect that a mere departure by the servant from the strict course of his duty, even for a purpose of his own, will not, in and of itself, be such a departure from the master's business as to relieve him of responsibility. 'Not every deviation of the servant from the strict execution of his duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility; but where there is not merely deviation, but a total departure, from the course of the master's business, so that the servant may be said to be "on a frolic of his own," the master is no longer answerable for the servant's conduct.' "

In this case, no doubt, the servant departed from the strict line of duty, but the extent of the deviation or departure is not shown, except to one familiar with the city and its different streets. But aside from this the servant was still in the act of taking the automobile to the garage, though in a roundabout way, [29] and whether his deviation or departure from the direct course was sufficient to relieve the master from all responsibility for his acts was, in my opinion, a question for the jury. To grant a new trial at this juncture would be a gross injustice to the plaintiffs if the ruling

should be erroneous, because they have no right of appeal from such an order. On the other hand, if the Court errs in denying the new trial its ruling may be reviewed and corrected by the Appellate Court without further trial or further expense.

The motion for a new trial is, therefore, denied.
March 11th, 1922.

[Endorsed]: Filed Mar. 11, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

In the District Court of the United States, Northern
Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY,
His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON,
Sometimes Known as Mrs. GEORGE
NIXON, Whose True Names are ARMAND
M. d'ALERIA, and KATE I. d'ALERIA,
Husband and Wife,

Defendants.

**Notice of Intention to Apply for a Writ of Error,
and Refusal of Codefendant to Join.**

To the Defendant Harold A. Adrian, also Known as
A. M. d'Aleria:

You are hereby notified that on the 21st day of
December, 1921, a verdict and judgment was ren-

dered and entered in the above-entitled cause on the trial thereof in favor of the plaintiffs therein and against the defendants for the sum of Twelve Thousand Dollars (\$12,000.00); and that the undersigned, who is sued herein as Kate Nixon and Mrs. George Nixon, and by supplemental complaint filed herein is named as Catherine I. d'Aleria, is desirous of taking such steps as may be necessary to have said judgment reviewed by the United States Circuit Court of Appeals at San Francisco, on a writ of error, and hereby requests that you endorse hereon either your consent to join with her in her application for said writ of error and in prosecuting the same or your refusal so to do, for the reason that such consent or refusal is required by the law relating to applications for writs of error.

Dated, this 26th day of January, 1922.

KATE I. d'ALERIA.

Sued Herein as Kate Nixon. Mrs. George Nixon,
and Catherine I. d'Aleria.

I, the undersigned, A. M. d'Aleria, sued herein as Harold A. Adrian, refuse to join in the application for a writ of error referred to in the foregoing notice, a copy of which has been served upon me this day at Chicago, Illinois.

Dated, Chicago, Illinois, this 2d day of February, 1922.

A. M. d'ALERIA.

Acknowledgment.

State of Illinois

County of Cook,—ss.

BE IT KNOWN, that on this 2d day of February, 1922, before me personally appeared A. M. d'Aleria, to me personally known to be the signer and sealer of the foregoing instrument, and he freely acknowledged that he voluntarily executed the same for the uses and purposes therein set forth.

[Seal]

THOMAS M. NORTON,
Notary Public.

My Commission expires July 11, 1925. [31]

Received a copy of the within instrument this 16th day of March, 1922, a writ of error and refusal of codefendant to join.

W. A. CAVITT,
Attorney for Plaintiffs.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the United States District Court, Northern
Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY,
His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Also
Known as Mrs. GEORGE NIXON, Whose
True Names are ARMAND M. d'ALERIA
and KATE I. d'ALERIA, Husband and
Wife,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that, on the 20th and 21st days of December, 1921, the above-entitled cause came on regularly for trial before the Court, Honorable Frank H. Rudkin, Judge, sitting with a jury, upon the amended complaint and the supplemental complaint of the plaintiffs and the answer to said amended complaint of the defendant Mrs. Kate Nixon (whose true name is Kate I. d'Aleria)' and on the default of Harold A. Adrian (whose true name is Armand M. d'Aleria), Mr. W. C. Cavitt appearing as attorney for the plaintiffs and Mr. H. B. M. Miller (representing Miller, Thornton, Miller and Watt, Thornton and Miller) appearing as attorneys for the defendant Mrs. Nixon, and the following proceedings were had and testimony taken:

Testimony was introduced on behalf of the plaintiffs and in support of their amended complaint by which it was shown that plaintiffs suffered a loss and damage resulting to them from a collision between an automobile being operated by the defendant Harold A. Adrian and one operated by the plaintiff Charles Shirey; that said collision was caused by and through the carelessness [33] and negligence of the said defendant Harold A. Adrian, and that the automobile being driven by him, the said Adrian, at the time of said collision was the property of the said Kate Nixon.

Thereupon plaintiffs closed their case.

Testimony of Mrs. Nixon, for Defendants.

The defendant Mrs. NIXON was then called as a witness on behalf of herself, and on being first duly sworn testified as follows, to wit:

Direct Examination.

I am the person sued in this case as Kate Nixon. Since the commencement of this action, I and Mr. d'Aleria, who is the same person sued herein as Harold A. Adrian, were married. We are not living together now as man and wife, and a suit is pending against him by me for divorce.

I was the owner of the Locomobile touring car which collided with plaintiffs' Studebaker, but at the time of that accident I was not in the car, and it was not being used by anyone under my instructions or authority.

(Testimony of Mrs. Nixon.)

Mr. MILLER.—Q. Harold Adrian was driving the car at the time of the accident, was he not?

Mr. CAVITT.—I object to that on the ground that it is immaterial, irrelevant and incompetent and calls for a conclusion of this witness.

The COURT.—You have proved it. Why should you object to it.

Mr. CAVITT.—I have proved it.

Mr. MILLER.—All right, I will take your proof then.

Q. Had you any talk with Harold Adrian shortly prior to this accident with relation to this Locomobile; and if so, state what it was.

Mr. CAVITT.—One moment. I object to that on the ground it is immaterial, irrelevant and incompetent, it is hearsay, not had in [34] the presence of either of the plaintiffs in this case and a self-serving declaration.

The COURT.—How are you going to prove authority, if there was authority, if you cannot prove it by the party from whom the authority was derived? Objection overruled.

Mr. CAVITT.—We note an exception.

A. I had asked him to take it directly from the Class A Garage on Post Street.

The COURT.—From what point?

A. From the Powell Street entrance of the St. Francis.

Mr. MILLER.—Q. Where was that Class A. Garage?

A. At 737 or 735 Post Street.

(Testimony of Mrs. Nixon.)

Q. And the St. Francis Hotel is located on Powell Street extending from Post to Geary?

A. From Post to Geary.

Q. Now, was Adrian your chauffer?

A. He was not.

Q. What use had that car been put to immediately prior to your talk with him?

A. We had been to call on some friends out on Palm Avenue.

Q. And you got back to the St. Francis?

A. And drove back to the St. Francis.

Q. That was about what time, Mrs. d'Aleria?

A. Somewhere about eleven, I do not know exactly, but it was eleven or a quarter past eleven.

Q. When you got out of the car at that time, tell the Court and jury just what you stated to him?

Mr. CAVITT.—I object to that on the ground that it is immaterial, irrelevant and incompetent, hearsay and a self-serving declaration.

The COURT.—Objection overruled. [35]

Mr. CAVITT.—Exception.

A. We drove to the Powell Street entrance of the St. Francis, and I said to him, "Now, you take the car up to the garage right away and leave it there." That was the whole conversation.

Q. What was Adrian's business?

A. He played the Wurlitzer organ in different theatres.

Q. He was a musician?

A. He was a player of the Wurlitzer organ.

Q. He was an organist? A. Yes.

(Testimony of Mrs. Nixon.)

Cross-examination.

Mr. Adrian's real name is Armand d'Aleria.

Mr. CAVITT.—Q. Where were you living at that time?

A. I was living in Reno.

(Witness continuing:) At the time of this accident I was living at the St. Francis and Mr. d'Aleria was living at the St. Francis Hotel. I think I had been living at the hotel about a week. Mr. Adrian drove the car that night and once or twice before. I think he drove the car once or twice while we were in Reno. He did not drive it from Reno to Los Angeles. He did not drive it from Los Angeles to San Francisco. I now state he has only driven the car once or twice before the accident. He got the car from the garage with my permission two or three times. I don't know exactly, I don't remember. When the car was first taken to the Class A. Garage I think the boy who was driving for me took it there; his name I believe was Clarence; Clarence had been driving the car two or three months I think. Mr. Adrian was in my employ in Reno as a musician. He may have driven the car once or twice in Reno. I do not say definitely he drove the car only four times. I say a few times. I do not think over a half a dozen times. I do not believe more than half a dozen times altogether [36] during the three months he was in my employ as a musician at Reno. I owned this same Locomobile touring car all of that time. He did not drive the

(Testimony of Mrs. Nixon.)

car after the accident. About the first time he drove my car in Reno I think was the latter part of March or fore part of April. The night of the accident Mr. Adrian and myself had been out to Mr. Arthur Reese's on Palm Avenue in the Richmond District, and got back to the St. Francis at about eleven or half past eleven, right around in there some place. The car had been kept by me in the Class A. Garage a week or two, something like, a week I think it was, I do not remember exactly; I had in San Francisco about two weeks something like that; I don't remember exactly; that is the only garage in which the car was kept at that time.

Redirect Examination.

Mr. Reese was a music publisher here in San Francisco and had a place down on Market Street, which I do not think was kept open at night.

Mr. MILLER.—We would ask the privilege of reading the deposition of Mr. Adrian; it is very short.

Mr. CAVITT.—I would like to look at that. I had no notice of it.

The COURT.—Was there no appearance by the plaintiffs at the time it was taken?

Mr. MILLER.—No.

Mr. CAVITT.—We did not have notice of when it was to be taken, or where it was going to be taken.

Mr. MILLER.—I think you are in error. We find among the papers in this case an affidavit of

(Testimony of Mrs. Nixon.)

Roswell Miller, to the effect that he served a notice on the plaintiff's attorney in the case [37] of the application for the taking of the deposition Harold A. Adrian on behalf of Kate Nixon—affidavit on application for commission to take deposition on direct interrogatories to be propounded to the defendant Harold A. Adrian, by leaving copy of said notice, affidavit and interrogatories on the only desk in the law office of W. C. Cavitt, the said plaintiff's attorney herein, said desk being in a conspicuous place in said office, to wit, the desk used by W. C. Cavitt while engaged in attending to his business as attorney at law. When said notice, affidavit and direct interrogatories were so left on said desk, said office was open but no person was in it, and affiant was notified at said time by F. J. Castlehun, an attorney at law, who shares a waiting-room with said W. C. Cavitt, that the said W. C. Cavitt was at said time not in the city and county of San Francisco, State of California, and the said F. J. Castelhun refused to admit service in the said notice, affidavit and direct interrogatories, or any of them. On the strength of that, a commission was issued by the Court for the taking of this testimony on the 4th day of October, 1920, to a notary public in Los Angeles, to take the deposition of Harold Adrian upon interrogatories that were presented with it.

Mr. CAVITT.—If your Honor please, this is the first time that I have seen this affidavit. The affi-

(Testimony of Mrs. Nixon.)

davit does not state that my office was open for business. The affidavit does not state that it was delivered to any person in charge of my office. As a matter of fact, I left the city and county of San Francisco on the 24th day of August, 1920, and went to my ranch and did not return to San Francisco until the 25th of October, 1920, and I had absolutely no notice that an application was ever made for this commission, and it was taken without any notice to plaintiffs [38] in this action, and plaintiffs had no notice whatever of it.

Mr. MILLER.—It is not a fact that I told you I was going to apply for a commission to take the deposition?

Mr. CAVITT.—Sure, you told me, and you even asked me to stipulate, and I refused to stipulate.

Mr. MILLER.—You refused?

Mr. CAVITT.—Yes.

The COURT.—Let me see the rules.

Mr. CAVITT.—As a matter of fact, I never had any notice, at all, and the papers were never delivered to me, and the fact is M. Castelhun told him he would not admit service on it. There is nothing in the affidavit to show that it was left with any person in my office, or that my office was open for business.

The COURT.—Rule 36 is: “Service of all papers other than writs and process may be made either by the marshal or by any person competent to be a witness in the cause in the following manner:

“If the service be not personal, it may be made by

(Testimony of Mrs. Nixon.)

leaving a copy of the paper to be served at the address left with the clerk as provided by Rule 4, with some person of suitable age and discretion, if any such be found at such address, and if not, then by leaving said copy in some conspicuous and comparatively secure place at such address."

Mr. CAVITT.—It does not appear by the affidavit, if your Honor please, that it was left with any person of suitable age and discretion.

Mr. MILLER.—It does not need to be. There was nobody there to take it.

The COURT.—There was no person in your office.

Mr. CAVITT.—No, there was no person in my private office. [39]

The COURT.—"By leaving said copy in some conspicuous and comparatively secure place at such address." Wasn't that done?

Mr. CAVITT.—I don't know. I was absent from the city and county of San Francisco.

The COURT.—The objection is overruled.

Mr. CAVITT.—Will your Honor permit me, before you make your ruling, to testify that I was absent from the city and county of San Francisco from the 24th day of August, 1920, to the 25th day of October, 1920?

Mr. MILLER.—I concede that without your having to testify to that.

The COURT.—The Court has made an order based on this, and you will have to proceed to vacate the order before the Judge who made it before I will entertain any testimony here.

(Testimony of Mrs. Nixon.)

Mr. CAVITT.—We note an exception.

Mr. MILLER.—(Reading:) “In the United States District Court, Northern District of California, Northern Division, Second Division, Charles Shirey and Jennie Shirey, Husband and Wife, Plaintiffs, vs. Harold A. Adrian and Kate Nixon, Sometimes Known as Mrs. George Nixon, Defendants, No. 16252.

“BE IT REMEMBERED that, pursuant to the attached commission, and on the 7th day of February, 1921, at 10:30 o'clock A. M. thereof, at 5226½ Boulevard, in the City of Los Angeles, County of Los Angeles, and State of California, before me, Elmer L. Kincaid, a Notary Public in and for said Los Angeles County, duly appointed and commissioned to administer oaths, etc., and commissioner duly appointed in the above entitled matter to propound the attached direct interrogatories to Harold A. Adrian, as a witness on behalf of the defendant, Kate Nixon, in the above-entitled action, personally appeared before me the said Harold A. Adrian and made the [40] following answers to the attached interrogatories propounded by me.

The deposition of Harold A. Adrian was then offered, objected to, objection overruled and then received and read in evidence, as follows:

Deposition of Harold A. Adrian, for Defendants.

My name is Harold A. Adrian, aged twenty-two years, living at 5226½ Sunset Boulevard, and am a musician; I am one of the defendants in this case and know my codefendant sued herein as Kate Nixon and Mrs. George Nixon. On the 19th and

(Deposition of Harold A. Adrian.

20th days of April, 1919, I was living at the St. Francis Hotel in San Francisco, which is on the west side of Powell Street between Geary and Post Streets. Mrs. Nixon was living at the St. Francis Hotel on those dates.

About 12:30 A. M. on Sunday, April 20th, 1919, I was driving and was in charge of a Locomobile automobile owned by Mrs. Nixon, at or near the intersection of Golden Gate Avenue and Gough Street, in the city and county of San Francisco, State of California. The defendant Mrs. Nixon was not at that time with me in that automobile; she had been with me in that automobile that evening when I was driving and operating the same, and she left the automobile about twenty minutes before the accident, which occurred at the intersection of Golden Gate Avenue and Gough Street; I dropped her at the St. Francis Hotel.

This automobile was kept in the Post Street Garage sometimes, and at other places.

Mr. CAVITT.—I object to that as immaterial, irrelevant and incompetent, and calling for the conclusion of the witness, and not the best evidence.

The COURT.—Where the garage was located? Why wouldn't it be the best evidence? [41]

Mr. CAVITT.—The best evidence would be the proper location of it on the map of the city and county of San Francisco.

The COURT.—The objection is overruled.

Mr. CAVITT.—Exception.

Mr. MILLER. (Reading):—"To Direct Inter-

(Deposition of Harold A. Adrian.)

rogatory 13 he answers: I don't know the exact location."

Q. 14. State whether or not, at the time Mrs. Nixon left said automobile, she gave you any instructions with relation to the same.

Mr. CAVITT.—I object to that, if your Honor please, on the ground that it is immaterial, irrelevant and incompetent, hearsay, a self-serving declaration.

The COURT.—The objection is overruled.

Mr. CAVITT.—Exception.

A. I was instructed to take the car to the garage, but first told her I was going down to Market Street to see a music publisher down there by the name of Reese, and then I was going to take the car to the garage.

"Q. 15. If your answer to the last foregoing interrogatory be that she instructed you to take said automobile to the Post Street Garage, state whether or not you took the same directly to said garage?

"To Direct Interrogatory 15 he answers: Not directly to the garage, but did so after I had finished my business."

"Q. 16. If your answer to the last foregoing interrogatory be that you did not take said automobile direct to said Post Street Garage after Mrs. Nixon got out of said automobile, state where you went with it?

"To direct interrogatory 16 he answers: I went to Market Street to the Pantages Theater Building, and then to Turk Street, on the [42] way to

(Deposition of Harold A. Adrian.)

Golden Gate Avenue, for a detour, a little ride. There I picked up Harry Hume, who wanted me to drive him to the Fairmont, and I was going to take him there when the accident happened."

Mr. CAVITT.—I move to strike out that part of the answer where he says he wanted him to do so, as immaterial, incompetent and irrelevant and hearsay.

The COURT.—He just said where he was going. I overrule the objection.

Mr. CAVITT.—Exception.

About the hour of 12:30 A. M. on Sunday, April 20th, 1919, a collision occurred on the intersection of Golden Gate Avenue with Gough Street, between said Locomobile automobile and a Studebaker automobile being driven or operated by the plaintiff Charles Shirey.

"Q. 18. If your answer to the last foregoing interrogatory be in the affirmative, state whether or not, at the time of such collision you were in charge of, or were operating, or were driving said Locomobile automobile?"

Mr. CAVITT.—I object to the question on the ground that it is immaterial, irrelevant and incompetent, calling for his conclusion as to whether or not he was in charge of the car.

The COURT.—That part of it is probably a conclusion. You may read the answer.

Mr. CAVITT.—Exception.

Mr. MILLER.—To direct Interrogatory 18 he answers "Yes."

(Deposition of Harold A. Adrian.)

The COURT.—I might say that the last answer you read was not responsive to the question. He was asked a double question and he answered “Yes.”

Mr. MILLER.—I presume it was intended as an answer to both of them, that he was in charge and operating, and driving. I presume that was the idea that was conveyed. It was my error in putting the question in that way. [43]

Q. 19. If your answer to the last foregoing Interrogatory be in the affirmative, state whether or not anyone was with you in said automobile, and if so who it was.

“A. Yes. Harry Hume and another party unknown to me by name.”

“Q. 21. State for whom and for what purpose you were driving or operating said automobile.”

Mr. CAVITT.—Objected to as immaterial, irrelevant and incompetent, and calling for the conclusion of the witness.

The COURT.—He may answer.

A. For the purpose of seeing a Mr. Rees at the Pantages Theater building about the formation of a music publishing company, which business was my individual business.

“Q. 41. Were you ever at any time in the employ of Mrs. Nixon as a chauffer?”

Mr. CAVITT.—I object to that as calling for the conclusion of the witness.

The COURT.—Overruled.

Mr. CAVITT.—Exception.

A. No.

(Deposition of Harold A. Adrian.)

“Q. 42. Were you ever at any time in the employ of Mrs. Nixon in any capacity, and if so, in what capacity?”

Mr. CAVITT.—Same objection.

The COURT.—The same ruling.

Mr. CAVITT.—Exception.

A. Concert organist.

Mr. MILLER.—That is our case.

**Testimony of Genevieve Johnson, for Plaintiffs
(In Rebuttal).**

The plaintiffs above named then called in rebuttal:

GENEVIEVE JOHNSON, who being first duly sworn, testified as follows:

Mr. CAVITT.—Q. What is your name?

A. Genevieve Johnson.

Q. Where, if anywhere, were you employed about the month of April, 1919?

A. Class A Garage.

Q. How long had you been employed there?

A. Since February, 1914.

Q. What were your duties in the Class A Garage?
[44]

A. Bookkeeper and in charge of the office.

Q. Did you know one Harold A. Adrian?

A. I did.

Q. Do you recall whether or not on or about April 19 or 20—prior to April 19, 1919, if at any time Harold Adrian brought into the Class A Garage an automobile?

Mr. MILLER.—I object to that as immaterial,

(Deposition of Genevieve Johnson.)

irrelevant and incompetent, unless it is connected with this case.

Mr. CAVITT.—That is preliminary, if your Honor please.

The COURT.—She may answer.

A. He brought a car into the garage, but I don't remember the date.

Mr. CAVITT.—Q. Was it prior to April 19, 1919?

A. I would not say the date, because I have not looked it up.

Q. You have not looked it up? A. No.

Q. Do you recall at any time in the month of April, 1919, when a Locomobile was brought in by Harold Adrian, in which he left instructions to send the bill to Mrs. Nixon at the St. Francis Hotel?

Mr. MILLER.—I object to that as immaterial, irrelevant and incompetent, a statement made by him not in the presence of this defendant, and in no wise binding upon the defendant, Mrs. Nixon.

The COURT.—This defendant has testified he drove the car only two or three times.

Mr. MILLER.—Down here, but not as to any charges in connection with it, or anything of that kind.

The COURT.—The charge is not material, but is to show what he had to do with the driving of the car. She may answer.

A. He brought the car into the garage and drove it out a number of times—came after it and took the car out.

(Deposition of Genevieve Johnson.)

Mr. MILLER.—I ask that it be stricken out as not responsive to the question.

The COURT.—Yes, the answer may be stricken. Answer the question asked. [45]

Mr. CAVITT.—Q. During the time that this car remained in the Class A. Garage, the Locomobile owned by Mrs. Nixon, I will ask you if at all times that Mr. Harold Adrian came in there and got the car he brought it back again?

Mr. MILLER.—I object to that, because it is indefinite; it might be one or two times, or it might be many.

Mr. CAVITT.—Q. At any time during the spring of 1919, from the month of April on.

A. He brought the car into the garage and took the car out of the garage—came after it several times again and took it out.

Mr. CAVITT.—That is all.

Cross-examination.

Mr. MILLER.—Q. When was this?

A. I don't remember the dates, because I have not looked them up.

Q. During what period of time was it?

A. I would not even say that, because Mrs. Nixon always kept her car there.

Q. Did it extend over a period of weeks, or months, or days, or what?

A. No, it was only for a short while.

Q. Have you any idea about how short?

A. No, I would not like to say.

(Deposition of Genevieve Johnson.)

Q. Have you any idea how many times he came in there and took the car?

A. Well, I remember a number of times he came in there and got the car.

Q. You say a number of times. Give us an idea of how many?

A. I know it was at least three or four times.

Q. At least three or four times?

A. Yes, probably more than that.

Q. You would not say it was in excess of that?

A. No, I would not make a positive statement.

Q. You would not say it was in excess of that?

A. You mean more than four times? [46]

Q. Yes.

A. Well, I know it was at least four times.

Q. At least four times? A. Yes.

Q. Was it during a period of a week, or during a period of two weeks, or three weeks, or what?

A. I do not remember.

Q. Was it every day?

A. I would not say that, either.

Q. You would not say whether it was every other day, either? A. No.

Q. You had no particular occasion to keep account of how many times this man took out that car or brought it in, any more than you did anyone else, did you? A. No.

Q. What is it that places it in your mind, nearly two years ago, that he came in there three or four times?

A. Because he brought the car in the garage, and

(Deposition of Genevieve Johnson.)

he came to me in the office and told me to send the bills to Mrs. Nixon at the St. Francis Hotel, as usual.

Q. Was there anyone else that did that besides him during that same period? A. No.

Q. In all other cases, people came in there and got their own cars and did not send anyone after them.

Mr. CAVITT.—I object to that as immaterial, irrelevant and incompetent.

A. Mrs. Nixon always had a driver before and it had been some boy we knew, and this boy we did not know until he came in after the car.

Mr. MILLER.—Q. She had always had a driver before. When, before, did she keep her car there?

A. Since 1914.

Q. Since 1914, how long prior to April was it that you had it there before?

A. That I don't remember.

Q. Did she keep the car steadily there since 1914?

A. No, off and on, whenever she was in San Francisco the car was [47] in the garage.

Q. Is there any particular incident connected with the matter which enables you now to remember what occurred in relation to this car in 1919?

A. The only thing that I remember is Mr. Adrian came into the office, and that I do remember.

Q. Did he come in on every occasion when he got it? A. No.

Q. How many times did he come into the office and tell you that?

(Deposition of Genevieve Johnson.)

A. He just came in the first time and told me.

Q. Now, then, that is the only thing that recalls the matter to which you have testified to your mind?

A. The gasoline station is right at the office door, and there can be easily seen from the office anyone going out.

Q. How do you know, then, other than the fact that he came in and told you what you have stated, that he came and got that car on a number of occasions?

A. Because I have seen him go out of the door with the car.

This is not all of the evidence, but it is all that is necessary on the hearing of this writ of error.

Thereupon the case was submitted to the jury and the following instructions were by the Court given to said jury:

Charge to Jury.

The COURT.—(Orally.) Gentlemen of the Jury: This is an action by the plaintiffs, Charles Shirey and Jennie Shirey, jointly, seeking to recover damages in the sum of \$51,013.00, [48] against Armand d'Aleria and Kate d'Aleria, for injuries alleged to have been received by the said Jennie Shirey on the 20th day of April, 1919, at or near the easterly side of Gough Street and near the northerly side thereof on the crossing of Gough Street and Golden Gate Avenue, while she was riding in a Studebaker automobile with her husband Charles Shirey and others, which said Studebaker automo-

bile was then proceeding in a northerly direction along and over the easterly side of Gough Street on said crossing, and along and over the easterly side of said intersection of said Gough Street and Golden Gate Avenue, and in the second place, by Charles Shirey individually, against said defendants, seeking to recover damages against said defendants in the sum of \$11,013, for alleged loss of services, of his wife and necessary expenses for caring for her injuries, and for loss of clothing and damages to said Studebaker automobile. You are instructed that if you find from the evidence that the defendants were negligent in this case, and that such negligence of said defendants was the proximate cause of the injuries complained of in the complaint, then the only matter for you to determine is the amount of damages, if any, to be allowed by you. You are further instructed that this is the only action that may be brought by them, or either of them, under the law of this state for damages growing out of said accident to said Jennie Shirley, and the damages in the aggregate must represent the loss to the plaintiffs for the injury to the wife, if any, as well as the loss, if any, to the husband; and the elements entering into such loss or damages are hereinafter defined in these instructions.

In determining what damages you are to give to the plaintiffs Charles Shirey and Jennie Shirey for the injuries received by the said Jennie Shirey, as set up in the amended complaint, you may award them damages in such sum as in your judgment will [49] fairly and reasonably compensate for the in-

juries the plaintiff Jennie Shirey has received; and in estimating the damages in this behalf, you may consider that before the accident was her health and physical activity, and the extent and nature of her wounds, hurts, bruises, if any, and also the extent to which, if at all, the injuries she received, or any then, are permanent in their character, as well as the physical pain and mental anxiety which said Jennie Shirey has suffered, or will certainly suffer in the future, because of her injuries. The law prescribes no exact measure by which such damages may be estimated, but leaves it to the sound discretion of the jury to fix the amount thereof, as under all the circumstances may be deemed just and proper, not exceeding the amount sued for in this behalf, to wit, \$40,000.00. The law does not require that the plaintiffs present any direct evidence to show the amount of damages they have sustained in this behalf,—the amount of money which would compensate for the injuries said Jennie Shirey has received; all that is necessary in this behalf is to show to the jury the extent of her injuries, and that they were proximately caused by the accident; then it is for the jury to determine in the manner I have indicated the amount of damages which ought to be awarded to plaintiffs therefor.

While it is incumbent upon the plaintiffs to prove their case, the law does not require from them an absolute demonstration that is such a degree of proof, excluding possibility of error, as produces absolute certainty, because such proof is rarely possible; moral certainty is all that is required, or the

degree of proof which produces conviction in an unprejudiced mind. By a preponderance of evidence it is not necessarily meant a greater number of witnesses, but if the plaintiffs have proven their case by such evidence as constitutes and produces conviction [50] in the mind of the jury, then they have proven their case by a preponderance of evidence. Preponderance of the evidence means that degree of evidence which proves to a moral certainty, or in other words, that degree of proof that produces conviction in an unprejudiced mind, regardless of the number of witnesses from whom it proceeds. The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact in a civil case.

You are instructed that the words "mental anxiety," as used in the foregoing instructions, mean that mental worry, distress, grief and mortification which a person may suffer as growing proximately out of an injury received in an accident, and are proper component elements of that mental suffering and anxiety for which the law entitles an injured person to redress if it appears from the testimony that such mental anxiety is proximately caused and the injuries received in such accident.

Under an ordinance of the city and county of San Francisco, known as Ordinance 1857 and amendments thereto, and the Motor Vehicle Act, both of which are in evidence, Charles Shirey as he drove north on Gough Street towards Golden Gate Avenue had the right of way over vehicles which were simultaneously approaching the intersection from

his (Charles Shirey's) left hand side, and the Court charges you that as Charles Shirey approached the said intersection and until he could see beyond the same, he had the right to assume that he would be accorded the right of way and that any vehicle simultaneously approaching the said intersection on Gough Street and from his (Charles Shirey's) left hand side would do so in reasonable manner and that he (Charles Shirey) would be given the right of way over said intersection. [51]

The defendant's plea of contributory negligence in this case is an affirmative plea, and the burden of proving such contributory negligence is upon the defendants and you must therefore believe by a preponderance of evidence that they have established such plea before you can find for them, as a bar to the rights of the plaintiffs, if any, to recover in this case, because under the law, a plea of contributory negligence is an affirmative one, and the burden is always upon the defendants to establish such plea of contributory negligence by a preponderance of the evidence of the whole case.

Negligence is defined as the omission to do something which a reasonable man, guided by those circumstances which ordinarily regulate the conduct of human affairs, would do, or in doing something which a prudent man would not do. It is not intrinsic or absolute, but always relating to some circumstances of time, place or persons.

If you find from the evidence that the plaintiff Jennie Shirey, before the accident in controversy here, performed services for her husband Charles

Shirey as alleged in the complaint, and shall further find that she has been unable since said accident, and will be unable in the future, to perform the same services by reason of any injuries received therein, then I instruct you that you should find for the plaintiff Charles Shirey such a sum in damages as will reasonably and fairly compensate him for such loss of services; and in addition thereto you may allow him such a sum as the evidence shows he has necessarily or reasonably incurred in employing physicians and surgeons to treat the injuries of his said wife, and also any reasonable or necessary amount of money paid by him to any nurse or nurses, and for medicine and the treatment of her said [52] injuries, in all not exceeding the total amount alleged in the complaint in this behalf, to wit, \$11,013.00.

In weighing the evidence you are to consider the credibility of the witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character as shown by their evidence, their manner on the stand, their relation to the parties, if any, their degree of intelligence, the reasonableness or unreasonableness of their statements. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony, or by testimony affecting the character of the witness for truth, honesty or integrity, or his motives, or by contradictory evidence. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some

other witness, or comport with some fact or facts otherwise known or established by the evidence.

In view of the fact that this is an action for the plaintiffs for injuries to the wife, and also by the husband for loss of services of his wife, and for expenses for repairing his automobile and alleged expenses, I instruct you that in fixing the damages, if any, if you find the defendants were negligent, you should fix the amount in each separate matter, irrespective of the other, and should not consider whether the total amount awarded is large or small, but you should fix the amount in each instance according to the instructions I have given you on that issue. In the event that you find for the plaintiffs herein, you should return but one verdict for an amount which in your judgment will compensate both plaintiffs [53] for the damage and loss suffered by reason of the injury to the plaintiff Jennie Shirey, and for damages to the automobile, if any, as alleged in the complaint.

When you have agreed upon a verdict herein and the same is in favor of the plaintiffs, then in the blank verdict handed to you you will insert in its respective place the amount, if anything, awarded to the plaintiffs for the injuries to the plaintiff Jennie Shirey, and likewise insert in its respective place the amount, if any, awarded to the plaintiff, Charles Shirey, adding the same together, and have said verdict signed by your foreman and returned in open court.

I further charge you, Gentlemen of the Jury, as a matter of law, that the driver of this car did not

interpose any defense in this action, so that, so far as he is concerned, the only question you need to consider is the amount or measure of damages to which the plaintiffs are entitled. The liability of the other defendant depends upon the purpose for which the car was being used at the time of the accident, and upon the relationship that existed between the owner of the car and the driver. Upon this question I charge you as follows:

If you believe from all the evidence in the case that at the time of the accident in the amended complaint herein referred to, the automobile therein mentioned was in the possession of and under the control of the defendant Adrian, and was being operated by him for his own purposes and not in the transaction of any of the duties of his employment with the defendant Mrs. Nixon, and that while so operating said automobile the plaintiffs were, or either of them was, injured or damaged, in such case the defendant Mrs. Nixon cannot be held legally responsible for any such injuries or damages. In other words, Gentlemen of the Jury, the master is liable for the acts of [54] his agent or servant in the course of his employment, and within the scope of the agent's authority, but the master is not liable for the acts committed by the agent not in the course of his employment and not within the scope of his authority. If in this case this machine was driven for the purpose of the owner by this driver then she is liable for his acts and for his neglect. If, on the other hand, it was not driven for her purposes, or in her business, there can be no recovery,

even though it was so used by the driver with her consent.

Your verdict in any event in this case will be in favor of the plaintiffs as against the driver of the car. Whether it will be against the other defendant or not will depend upon your finding upon the question as to how he was driving the car at the time and for what purpose he was driving it.

Anything further, Gentlemen?

Mr. MILLER.—Would your Honor permit me to make one suggestion as to the last instruction you gave to the jury? I think it goes a little further than your Honor intended it to. As I understood it to be, “If you find from the evidence that the car was used by the defendant Adrian for the purposes of the owner, Mrs. Nixon would be liable.” I presume your Honor intended by that, “If it was being used by him at the time of the accident for the purposes of Mrs. Nixon.”

The COURT.—Certainly. At the time the injury was inflicted is the time my instructions relate to, of course.

Anything further?

Mr. MILLER.—We desire to take an exception, if the Court please, to the fact that the Court did not give the instruction requested, that the jury find in favor of Mrs. Nixon.

The COURT.—Yes. [55]

In the United States District Court, Northern
Division of California, Second Division.

No. 16252.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Also
Known as Mrs. GEORGE NIXON, Whose
True Names are ARMAND M. d'ALERIA
and KATE I. d'ALERIA, Husband and Wife,
Defendants.

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED AND
AGREED that the foregoing bill of exceptions con-
tains a true and correct copy of all portions of
testimony of the witnesses given at the trial of said
cause that are necessary to be used on the hearing
of the writ of error herein, and also a true and
correct copy of all of the instructions given by the
Court.

It is also stipulated that said bill of exceptions
may be settled, allowed and approved by the Court
as the bill of exceptions to be used on the hearing
of said writ of error and that the same may be used
on the hearing of said writ of error.

Dated this 5th day of July, 1922.

W. C. CAVITT,

Attorney for Plaintiffs.

MILLER, THORNTON and MILLER,

W. I. GILBERT,

Attorneys for Defendant Kate I. d'Aleria. [56]

In the United States District Court, Northern Division of California, Second Division.

No. 16252.

CHARLES SHIREY and JENNIE SHIREY,
His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON Also
Known as Mrs. GEORGE NIXON Whose
True Names are ARMAND M. d'ALERIA
and KATE I. d'ALERIA, Husband and
Wife,

Defendants.

Order Settling Bill of Exceptions.

The above-entitled cause having been tried in the above-entitled court before Honorable Frank H. Rudkin, a Judge of the United States District Court for the Eastern District of Washington, and it being stipulated by the parties to said cause that said bill of exceptions may be settled by said Judge in the State of Washington rather than in the city and county of San Francisco, State of California;

and that the foregoing bill of exceptions is true and correct in all respects, and that the same may be used upon the hearing of the writ of error, heretofore filed herein, before the Circuit Court of Appeals at San Francisco.

IT IS NOW ORDERED that said bill of exceptions be, and it hereby is, settled, allowed and approved; that the same is in all respects true and correct, and that the same may be used on the hearing of the writ of error heretofore filed herein in said United States Circuit Court of Appeals at San Francisco.

Dated, this 10th day of July, 1922.

FRANK H. RUDKIN,

[Endorsed]: Filed July 14, 1922. Walter B. Maling, Clerk. [57]

In the United States District Court, Northern Division of California, Second Division.

No. 16252.

CHARLES SHIREY and JENNIE SHIREY,
His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, Also
Known as Mrs. GEORGE NIXON Whose
True Names are ARMOND M. d'ALERIA
and KATE I. d'ALERIA, Husband and
Wife.

Defendants.

Petition for a Writ of Error.

The defendant Kate I. d'Aleria feeling aggrieved by the verdict of the jury and the judgment entered thereon in the above-entitled cause on the 21st day of December, 1921, whereby it was adjudged that the plaintiffs have and recover from the defendants the sum of Twelve Thousand (\$12,000.00) Dollars; and the defendant Armand M. d'Aleria having refused to join with his petitioner in a petition for a writ of error as appears by the notice and refusal hereinafter referred to, said petitioner Kate I. d'Aleria comes now by her attorneys Miller, Thornton and Miller and W. I. Gilbert and petitions said court for an order allowing her alone to prosecute a writ of error to the United States Circuit Court of Appeals in and for the Ninth Circuit according to the laws of the United States in that behalf made and provided, and in connection with this petition petitioner herewith presents and files her assignment of errors, and the notice and refusal above mentioned.

And your petitioner further prays that an order may be made fixing the amount of a supersedeas bond which she shall give and furnish upon said writ of error, and that upon the giving of such bond all further proceedings in this Court be suspended, stayed [58] and superseded until the determination of said writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated, this 16th day of March, 1922.

W. I. GILBERT and
MILLER, THORNTON and MILLER,
Attorneys for said Petitioner.

Received a copy of the within instrument this 16th day of March, 1922, petition for writ of error.

W. C. CAVITT,
Attorney for Plaintiffs.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [59]

In the District Court of the United States, Northern
Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN, and KATE NIXON,
Sometimes Known as Mrs. GEORGE
NIXON, Whose True Names are ARMAND
M. d'ALERIA and KATE I. d'ALERIA,
Husband and Wife,

Defendants.

Assignment of Errors.

Now comes Kate I. d'Aleria, named in the complaint herein as Kate Nixon and Mrs. George Nixon and in the supplemental complaint served and filed

herein as Katherine I. d'Aleria, and serves and files in the above-entitled cause this assignment of errors upon which she will rely in the prosecution of her writ of error in the above-entitled action, and specifies in particular that in the records and proceedings in said cause as will appear in the transcript hereinafter to be filed in the United States Circuit Court of Appeals for the Ninth Judicial Circuit, there is manifest error as follows:

I.

That the United States District Court for the Northern Division of California, Second Division, erred in refusing to give to the jury the following instructions requested by this defendant, to wit:

“You are hereby instructed that the plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon, you find a verdict in her favor and against the plaintiffs,”

(and because of such refusal said defendant duly excepted) for the reason that the evidence introduced at the trial of said cause was, and is, insufficient to justify the verdict against her because of [60] the fact that said evidence shows without any contradiction whatever:

1. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision the

damages claimed by plaintiffs occurred, the automobile of said defendant was not in her possession, or under her management or control, but was in the possession of and under the management and control of, and was being operated by the defendant Armand M. d'Aleria.

2. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision the damages complained of by plaintiffs occurred, the automobile of this defendant was not being operated or used by the said defendant Armand M. d'Aleria in the transaction of any of the business of this defendant, or in connection with any business of this defendant.

3. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision the damages complained of by plaintiffs occurred, the automobile of this defendant was being operated and used by the said defendant Armand M. d'Aleria solely and only for his own personal purposes.

4. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey and that of this defendant, and as a result of which collision [61] the damages complained of by plaintiff oc-

curred, the automobile of this defendant was being operated and used by the defendant Armand M. d'Aleria for his own personal purposes after he had been instructed by this defendant to take the same to the garage where she kept it, and was not being by him taken to said garage at the time of said collision.

5. The evidence shows without any contradiction whatever that at the time of the collision in the complaint herein referred to between the automobile of the plaintiff Charles Shirey, and that of this defendant, and as a result of which collision the damages complained of by plaintiff occurred, that the defendant Armond M. d'Aleria, who was operating said defendant's automobile, was not in the employ of said defendant as a chauffeur or to have any management or control of said automobile but solely and only as a musician, and that in operating and using said automobile he was not acting within the scope of any employment in which he was engaged by this defendant.

II.

That the United States District Court for the Northern Division of California, Second Division, erred in receiving and filing the verdict herein which was rendered by the jury in said cause for the following reasons:

1. That there was no evidence of any kind or character introduced at the trial of said cause which shows, or tends to show, that the automobile of the defendant Mrs. Nixon at the time of the accident in the complaint herein referred to was being used

by the defendant Armand M. d'Aleria, or by anyone for or in connection with any business or affairs of any kind or character of the said Mrs. Nixon, or within the scope of any employment in which he, or they, were engaged by her.

2. The evidence introduced at the trial of said cause does show, without any contradiction whatever that at the time of the [62] accident in the complaint in this action referred to, the automobile of the said Mrs. Nixon was being used by the said defendant Armand M. d'Aleria solely and only for his own private purposes, and in the transaction of his own personal business, which was not in any way connected with any business or affairs of the said Mrs. Nixon, or in connection with any matters or things within the scope of his employment by the said Mrs. Nixon.

3. That said verdict was against the law in that it is in direct violation of the following instruction given by the Court to the jury, to wit:

“If you believe from all the evidence in the case that at the time of the accident in the amended complaint herein referred to, the automobile therein mentioned was in the possession of and under the control of the defendant Adrian, and was being operated by him for his own purposes and not in the transaction of any of the duties of his employment with the defendant Mrs. Nixon, and that while so operating said automobile the plaintiffs were, or either of them was, injured or damaged, in such case the defendant Mrs. Nixon cannot be held le-

gally responsible for any such injuries or damages. In other words, Gentlemen of the Jury, the master is liable for the acts of his agent or servant in the course of his employment, and within the scope of the agent's authority, but the master is not liable for acts committed by the agent not in the course of his employment and not within the scope of his authority. If in this case this machine was driven for the purpose of the owner by his driver then she is liable for his acts and for his neglect. If, on the other hand, it was not driven for her purposes, or in her business, there can be no recovery, even though it was so used by the driver with her consent.

"Your verdict in any event in this case will be in favor of the plaintiffs as against the driver of the car, whether it will be against the other defendant or not will depend upon your finding upon the question as to how he was driving the car at the time and for what purpose he was driving it."

Anything further, gentlemen?

"Mr. MILLER.—Would you Honor permit me to make one suggestion as to the last instruction you gave to the jury? I think it goes a little farther than your Honor intended it to. As I understood it to be, 'if you find from the evidence that the car was used by the defendant Adrian for the purposes of the owner, Mrs. Nixon would be liable.' I presume your Honor intended by that, if it was being used by him

at the time of the accident for the purposes of Mrs. Nixon.

“The COURT.—Certainly. At the time the injury was inflicted is the time my instructions relate to, of course.” [63]

III.

That the United States District Court for the Northern Division of California, Second Division, erred in entering and filing a judgment herein in favor of the plaintiffs and against said defendant Mrs. Nixon upon the verdict rendered by the jury in said cause for the same reasons set forth and stated in paragraph II hereof, all of which reasons are hereby referred to, and made a part of this paragraph III, the same as if they were specifically incorporated herein.

WHEREFORE, the defendant Mrs. Nixon prays that the judgment of the said United States District Court made and entered in the above-entitled cause in favor of the plaintiffs and against her be reversed and that said Court be ordered and directed to make and enter in said cause a judgment in favor of the said Mrs. Nixon and against the plaintiffs.

MILLER, THORNTON and MILLER,
W. I. GILBERT,

Attorneys for Defendant Mrs. Nixon.

Received a copy of the within instrument this
16th day of March, 1922. Assignment of error.

W. A. CAVITT,
Attorney for Plaintiffs.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

In the United States District Court, Northern
Division of California, Second Division.

CHARLES SHIREY and JENNIE SHIREY,
His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also
Known as Mrs. GEORGE NIXON, Whose
True Names are ARMAND M. d'ALERIA,
and KATE I. d'ALERIA, Husband and
Wife,

Defendants.

**Order Allowing Writ of Error and Fixing Amount
of Cost and Supersedeas Bond.**

On motion of H. B. M. Miller, one of the attorneys for the defendant Kate I. d'Aleria, and upon filing herein by said defendant of her petition for a writ of error and a notice by her given to her codefendant A. M. d'Aleria of her intention to petition for said writ and demanding that he either join with her in said petition or refuse so to do, to which notice is added a refusal of said defendant A. M. d'Aleria to join with her in said petition, and also an assignment of errors.

It is ordered that the said defendant Kate I. d'Aleria be, and she hereby is, allowed to prosecute

said petition in her own name alone without joining with her her codefendant A. M. d'Aleria, and that said Writ of Error be, and the same hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment made and entered herein in favor of the plaintiffs above named and against the defendants on the 21st day of December, 1921, in so far as said judgment is against her, the said defendant Kate I. d'Aleria.

And it is further ordered that upon the filing in said [65] cause with the Clerk of this Court of a good and sufficient bond in the sum of Fifteen Thousand Dollars, with good and sufficient security to be approved by this Court that she, the said defendant Kate I. d'Aleria, will prosecute her writ of error to effect and answer all damages and costs and pay the amount of the judgment, including just damages for delay, together with costs and interest on the appeal if she, the said defendant, fails to make her plea good, all further proceedings in this court be hereby suspended until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, this 16th day of March, 1922.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed Mar. 16, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [66]

In the United States District Court, Northern
Division of California, Second Division.

No. 16,252.

CHARLES SHIREY and JENNIE SHIREY,
His Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also
Known as Mrs. GEORGE NIXON, Whose
True Names are ARMAND M. d'ALERIA,
and KATE I. d'ALERIA, Husband and
Wife,

Defendants.

**Order Authorizing Withdrawal of Exhibits to be
Sent by Clerk to United States Circuit Court
of Appeals.**

It appearing to the Court that a writ of error has
been taken out in the above-entitled cause to the
United States Circuit Court of Appeals for the
Ninth Circuit, and that the exhibits introduced at
the trial of said cause are necessary for the hearing
upon said writ of error,—

It is ORDERED that the Clerk of the above-
entitled court transmit all the exhibits introduced
in evidence on the trial of the above-entitled cause
to the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.

Dated, this 10th day of July, 1922.

(Sgd.) M. T. DOOLING,

Judge.

[Endorsed]: Filed Jul. 10, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

(Title of Court and Cause.)

Cost and Supersedeas Bond.

KNOW ALL MEN BY THESE PRESENTS: That I, Kate I. d'Aleria, one of the defendants above named, as principal, and Maryland Casualty Company, a corporation, organized and existing under and by virtue of the laws of the State of Maryland, and having its principal place of business at Baltimore, Maryland, as surety, are held and firmly bound unto the plaintiffs in the above-entitled action in the sum of Fifteen Thousand and No/100 Dollars (\$15,000), for which payment well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 30th day of March 1922.

The condition of the above obligation is such, that whereas the above-named Kate I. d'Aleria has sued out a writ of error in the United States Circuit Court of Appeals in and for the Ninth Circuit, to review and reverse the judgment made and entered in the above-entitled action in favor of the plaintiffs therein and against the defendants for the sum of Twelve Thousand and No/100 Dollars

(\$12,000), together with interest and costs, in so far as she is concerned.

NOW, THEREFORE, if the above-bounden defendant, Kate I. d'Aleria, shall prosecute such writ of error to effect, and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain and be in full force and effect.

KATE I. d'ALERIA.

[Seal] MARYLAND CASUALTY COMPANY,

By GEO. W. BLISS,
Attorney in Fact. [68]

State of California,

County of Los Angeles,—ss.

On this 30th day of March, in the year one thousand nine hundred and twenty-two, before me, Isabelle Perry, a notary public, personally appeared Geo. W. Bliss, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of the Maryland Casualty Company, and acknowledged to me that he subscribed the name of Maryland Casualty Company thereto as principal and his own name as attorney in fact.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

[Seal]

ISABELLE PERRY,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Jan. 28, 1926.

[Endorsed]: Filed Apr. 1, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [69]

(Title of Court and Cause.)

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Will you please prepare at once transcript of the record in the above-entitled cause on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit and forward the same to the Clerk of that court as soon as completed, including in said transcript the following papers necessary for the determination of the questions to be passed upon by said Circuit Court of Appeals, together with all endorsements thereon, namely:

1. Amended complaint;
2. Answer to amended complaint;
3. Supplemental complaint;
4. Judgment;
5. Stipulation of parties authorizing the Judge of the trial court to attend to all matters outside of this district, with the same force and effect as if attended to in this district; and order on same.
6. Bill of exceptions with stipulation as to its correctness, and order settling said Bill attached;
7. Assignment of errors;
8. Petition for writ of error;
9. Order allowing writ of error and fixing cost and supersedeas Bond;
10. Cost and supersedeas bond;
11. Original writ of error;

12. Copy of writ of error;
13. Original citation;
14. Copy of citation;
15. This praecipe;
16. Notice, and refusal of codeft. to join in application for writ of error;
17. All exhibits and order allowing withdrawal;
18. Opinion denying new trial; [70]
19. Order for judgment;
20. Verdict.

Dated, this 7th day of July, 1922.

MILLER, THORNTON and MILLER,
W. I. GILBERT,
Attorneys for Defendant Mrs. Kate Nixon.

[Endorsed]: Filed Jul. 8, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

(Title of Court and Cause.)

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing seventy-one (71) pages, numbered from 1 to 71, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$30.35; that said amount was paid by the attorneys for the defendant, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 19th day of July, A. D. 1922.

[Seal] WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [72]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Harold A. Adrian and Kate Nixon, also known as Mrs. George Nixon, whose true names are Armand M. d'Aleria and Kate I. d'Aleria, husband and wife, plaintiffs in error, and Charles Shirey and Jennie Shirey, defendants in error, a manifest error hath happened, to the great damage of the said Kate I. d'Aleria, plaintiff in error, as by her complaint appears:

We, being willing that error, if any hath been,

should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 16th day of March, in the year of our Lord one thousand, nine hundred and twenty-two.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the
Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed by

FRANK H. RUDKIN,
U. S. District Judge for the Eastern District of
Washington. [73]

Received a copy of the within writ of error this
17th day of March, 1922.

W. C. CAVITT,
Attorney for Defendants in Error.

(Return to Writ of Error.)

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court:

[Seal]

WALTER B. MALING,
Clerk U. S. District Court for the Northern District
of California.

[Endorsed]: No. 16,252. United States District Court for the Northern District of California, Second Division. Harold A. Adrian et al., Plaintiffs in Error, vs. Charles Shirey et al., Defendants in Error. Writ of Error. Filed Mar. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

In the United States District Court, Northern
Division of California, Second Division.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Plaintiffs,

vs.

HAROLD A. ADRIAN and KATE NIXON, also
Known as Mrs. GEORGE NIXON, Whose
True Names are ARMOND M. d'ALERIA,
and KATE I. d'ALERIA, Husband and
Wife,

Defendants.

Citation on Writ of Error.

United States of America,
Ninth Judicial Circuit,—ss.

To Charles Shirey and Jennie Shirey, His Wife,
GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the District Court of the United States for the Northern District of California, wherein Kate I. d'Aleria is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error Kate I. d'Aleria as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable FRANK H. RUDKIN, United States District Judge for the Eastern District of Washington, this 16th day of March, 1922.

FRANK H. RUDKIN,
United States District Judge. [74]

Received a copy of the within instrument this 17th day of March, 1922, citation on writ of error.

W. C. CAVITT.

Attorney for Plaintiffs.

[Endorsed]: No. 16,252. In the United States District Court, Northern Division of California, Second Division. Charles Shirey and Jennie Shirey, his wife, Plaintiffs, vs. Harold A. Adrian and Kate Nixon, Also Known as Mrs. George Nixon, Whose True Names are Armand M. d'Aleria and Kate I. d'Aleria, Husband and Wife, Defendants. Citation on Writ of Error. Filed Mar. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3895. United States Circuit Court of Appeals for the Ninth Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed July 19, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals, Ninth Judicial Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Defendants in Error.

**Stipulation and Order Extending Time to File
Record and Docket Cause—Dated April 13,
1922.**

The bill of exceptions in the above-entitled cause not yet having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto that the plaintiff in error may have, and the Judge of the above-entitled court is respectfully requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used on the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 13th day of April, 1922.

W. I. GILBERT and

MILLER, THORNTON and MILLER,

Attorneys for Plaintiff in Error.

W. C. CAVITT,

Attorney for Defendants in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation, it is ordered that

the plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof within which to prepare, serve and file the transcript in said stipulation referred to.

Dated, this 15th day of April, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and order Extending Time to File Transcript. Filed Apr. 15, 1922. F. D. Monckton, Clerk. Refiled Jul. 19, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth
Judicial Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Defendants in Error.

**Stipulation and Order Extending Time to File
Record and Docket Cause—Dated May 8, 1922.**

The bill of exceptions in the above-entitled cause not yet having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto

that the plaintiff in error may have, and the Judge of the above-entitled court is respectfully requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used on the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 8th day of May, 1922.

W. C. CAVITT, per

F. J. CASTELHUN,

Attorney for Defendants in Error.

W. I. GILBERT and

MILLER, THORNTON and MILLER,

Attorneys for Plaintiff in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation. it is ordered that the plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof, within which to prepare, serve and file the transcript in said stipulation referred to.

Dated, this 10th day of May, 1922.

W. H. HUNT,

Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and Order Extending Time to File Transcript. Filed May 10, 1922. F. D. Monckton, Clerk. Refiled Jul. 19, 1922. F. D. Monckton, Clerk.

United States Circuit Court of Appeals, Ninth
Judicial Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Defendants in Error.

**Stipulation and Order Extending Time to File
Record and Docket Cause—Dated June 7, 1922.**

The bill of exceptions in the above-entitled cause not having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto that the plaintiff in error may have, and the Judge of the above-entitled court is respectfully requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used in the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 7th day of June, 1922.

W. I. GILBERT,

MILLER, THORNTON and MILLER,

Attorneys for Plaintiff in Error.

W. C. CAVITT,

Attorney for Defendants in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation, it is ordered that the

plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof within which to prepare, serve and file the transcript and stipulation referred to.

Dated, this 7th day of June, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and Order Extending Time to File Transcript. Filed Jun. 7, 1922. F. D. Monekton, Clerk. Refiled Jul. 19, 1922. F. D. Monekton, Clerk.

United States Circuit Court of Appeals, Ninth
Judicial Circuit.

KATE I. d'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE SHIREY, His
Wife,

Defendants in Error.

**Stipulation and Order Extending Time to File
Record and Docket Cause—Dated July 5, 1922.**

The bill of exceptions in the above-entitled cause not yet having been settled and allowed by the Judge, it is hereby stipulated by the parties hereto that the plaintiff in error may have, and the Judge

of the above-entitled court is respectively requested to grant to her, thirty (30) days from and after the date hereof within which to prepare, serve and file with the United States Circuit Court of Appeals her transcript to be used in the hearing of the writ of error, heretofore to her granted, by said United States Circuit Court of Appeals.

Dated, this 5th day of July, 1922.

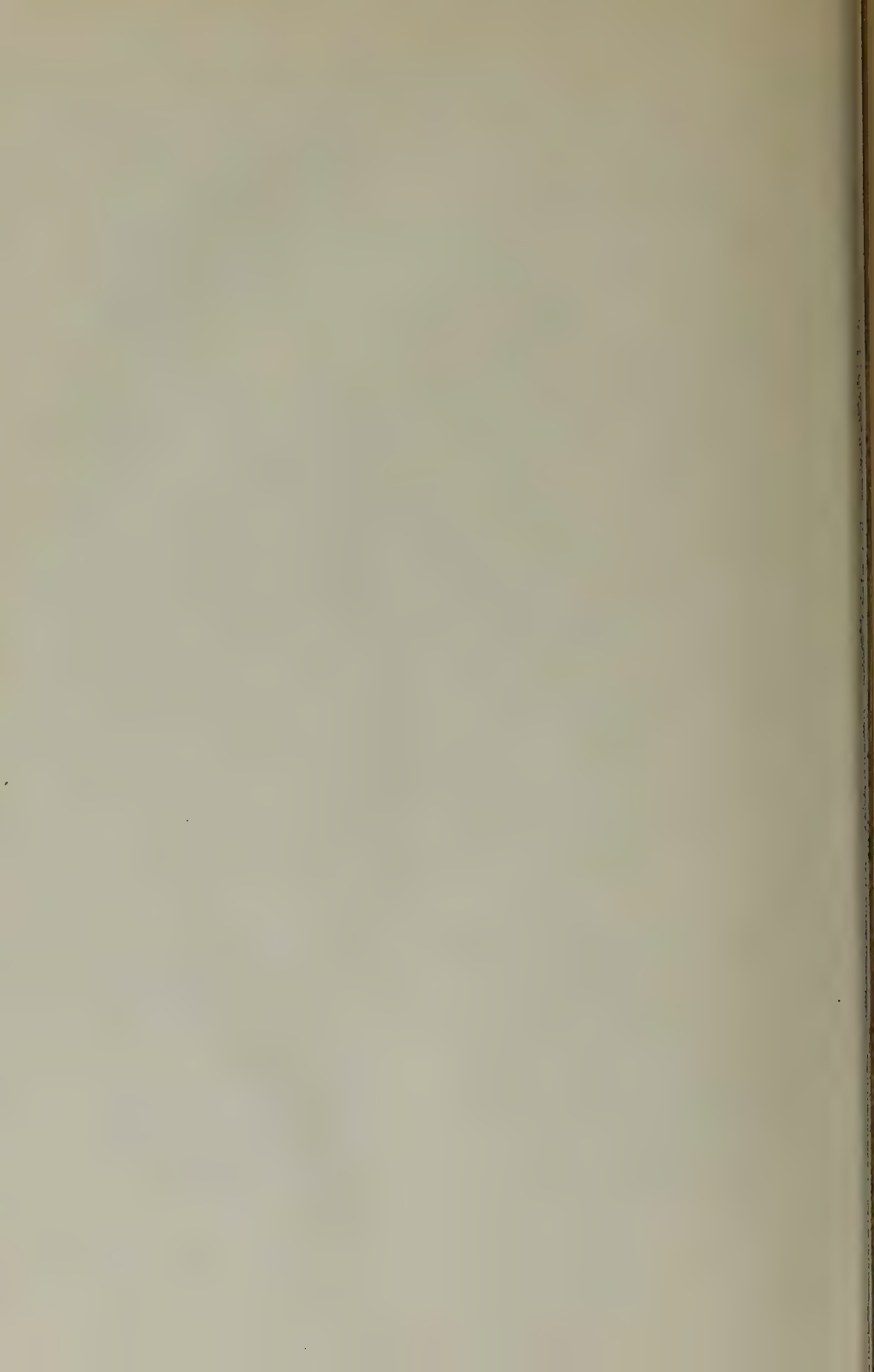
MILLER, THORNTON and MILLER,
W. I. GILBERT,
Attorneys for Plaintiff in Error.
W. C. CAVITT,
Attorney for Defendants in Error.

Good cause appearing to me therefor, and by virtue of the foregoing stipulation, it is ordered that the plaintiff in error have, and there is hereby granted to her, thirty (30) days from and after the date hereof within which to prepare, serve and file the transcript in said stipulation referred to.

Dated, this 5th day of July, 1922.

W. H. HUNT,
Judge.

[Endorsed]: No. 3895. United States Circuit Court of Appeals, Ninth Judicial Circuit. Kate I. d'Aleria, Plaintiff in Error, vs. Charles Shirey and Jennie Shirey, His Wife, Defendants in Error. Stipulation and Order Extending Time to File Transcript. Filed Jul. 5, 1922. F. D. Monckton, Clerk. Refiled Jul. 19, 1922, F. D. Monckton, Clerk.



No. 3895

IN THE
United States Circuit Court of Appeals

For the Ninth Circuit

KATE I. D'ALERIA,

Plaintiff in Error,

VS.

CHARLES SHIREY and JENNIE SHIREY
(his wife),

Defendants in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

MILLER, THORNTON & MILLER,

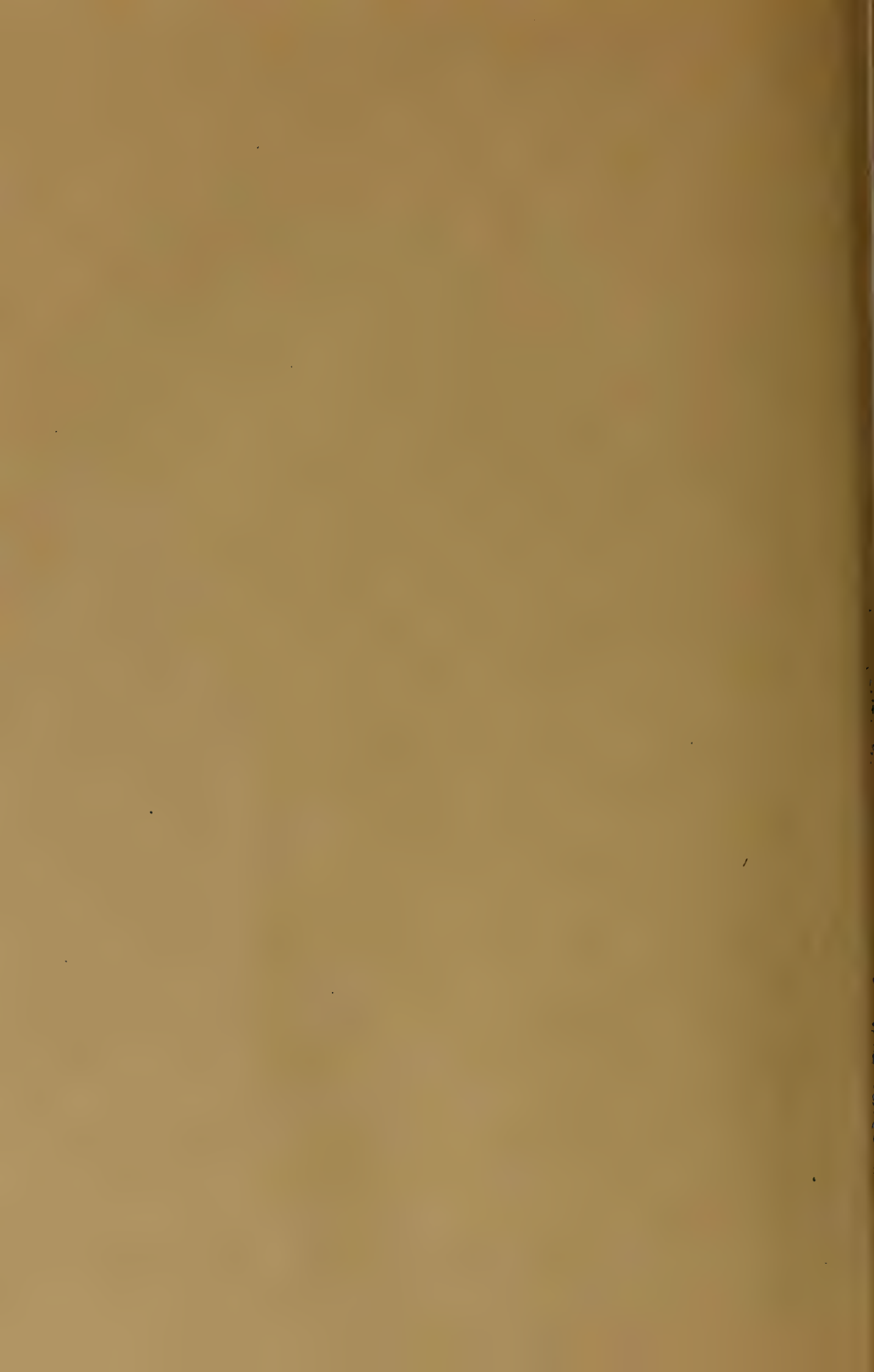
W. I. GILBERT,

Attorneys for Plaintiff in Error.

FILED

SEP 25 1922

F. D. MONCKTON,
CLERK.



No. 3895

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KATE I. D'ALERIA,

Plaintiff in Error,

VS.

CHARLES SHIREY and JENNIE SHIREY
(his wife),

Defendants in Error.

OPENING BRIEF OF PLAINTIFF IN ERROR.

Introduction.

This is an action that was instituted by the defendants in error, as plaintiffs, against Harold A. Adrian and Kate Nixon, sometimes known as Mrs. George Nixon, as defendants, to recover from said defendants the sum of \$40,000.00 for personal injuries alleged to have been suffered by the said Jennie Shirey by and through their carelessness and negligence, and to recover from them for and on behalf of the said Charles Shirey the sum of \$11,013.00 damages for loss of services of his wife and for expenses incurred.

Amended Complaint, pages 1 to 12 of Transcript.

The case went to trial before the Court sitting with a jury, the Honorable Frank H. Rudkin presiding, on the amended complaint of the plaintiffs, the answer thereto of the defendant Kate Nixon and the supplemental complaint of the defendants in error, it being alleged in said supplemental complaint that the true name of the defendant Harold A. Adrian is Armand d'Aleria (his true name is Armand M. d'Aleria), and that since the commencement of the action he and the defendant Kate Nixon had married and were then husband and wife.

Amended Complaint, pages 1 to 12 of Transcript;

Answer to Amended Complaint, pages 12 to 21 of Transcript;

Supplemental Complaint, pages 21 to 24 of Transcript;

Notice of Intention, etc., and Refusal, pages 34 and 35 of Transcript.

No answer was served or filed in said cause by or on behalf of the defendant Harold A. Adrian, either under that name or under his true name of Armand M. d'Aleria, or otherwise, nor was any appearance made by him or for or on his behalf, at the trial of said cause.

When the case was closed after the introduction of evidence, this plaintiff in error requested the Court to give to the jury the following instruction, to-wit:

“You are hereby instructed that the plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon, you find a verdict in her favor and against the plaintiffs,”

Page 70 of Transcript,

which request was refused, whereupon said plaintiff in error duly excepted to such refusal, as appears by the bill of exceptions contained in the transcript herein.

Page 64 of Transcript.

The Court then gave to the jury the instructions which appear on pages 56 to 64, inclusive, of said transcript, whereupon said jury retired for deliberation and thereafter rendered a verdict as follows, to-wit:

“We, the jury, find in favor of the plaintiffs and assess the damages against the defendants in the total amount as follows:

1. For injuries to Jennie Shirey. . \$10,000.00
2. For plaintiff Charles Shirey
for lost services of wife and
expenses 2,000.00

Total.....\$12,000.00.

Jas. W. Harris,
Foreman.”

Verdict, page 26 of Transcript.

And thereafter and in accordance with said verdict, judgment was made and entered in said cause in favor of the plaintiffs therein and against the defendants.

Pages 26 and 27 of Transcript.

Thereafter this plaintiff in error petitioned the Court for a new trial of said cause, which petition was denied, as is evidenced by the opinion of said Court on pages 30 to 34, inclusive, of the transcript of record herein; and within the time allowed by law, the stipulations of the parties, and the orders of the Court, such proceedings and taken by this plaintiff in error as were necessary to bring said cause before this Court for hearing on a writ of error (which said writ of error has been and is being prosecuted by her alone for the reason that her codefendant refused to join with her in her application therefor, as appears by the notice of intention, etc., and refusal on pages 34 and 35 of said transcript), it being the contention of said plaintiff in error that the judgment made and entered against her in said cause should be reversed, and the trial Court directed to make and enter judgment therein in her favor, on the grounds and for the reasons set forth and stated in the assignment of errors served and filed therein by her, which appears on pages 69 to 75, inclusive, of said transcript as follows:

1. That the evidence introduced at the trial of said cause was, and is, insufficient to justify the verdict of the jury.

2. That the trial court erred in refusing to give to the jury, the instruction requested by this plaintiff in error, to render a verdict in said cause in her favor and against the plaintiffs therein.

And this plaintiff in error now presents to this Court the facts and the law in support of the foregoing contentions.

Statement of the Case.

In the amended complaint on file herein, it is alleged that by and through the carelessness and negligence of the defendants in said cause, an automobile owned, operated and driven by them collided with an automobile owned, operated and driven by the plaintiffs, causing the damage therein referred to. In the answer of this plaintiff in error, the allegations of said amended complaint are denied and there is stated as a special defense that while said plaintiff in error was the owner of the automobile which collided with that of the plaintiffs she did not have, at the time of the accident in said complaint alleged, any management or control thereof, and was not riding therein; that at the time of said accident her said automobile was in the sole management and control of the defendant Adrian, and was being operated and used by him solely and only for his own personal purposes, and not for her, or in connection with any of her business or affairs, and in violation of her instructions to him.

Amended Complaint, paragraphs V and VI,
pages 3 and 4 of Transcript;

Answer to Amended Complaint, pages 12 to
21, inclusive, and see particularly third
defense, pages 19 and 20.

At the trial of the case, the only evidence introduced which in any way connects this plaintiff in error with the accident and injuries complained of in plaintiff's amended complaint is that of the

plaintiff herself, that of the defendant Adrian, and that of one Genevieve Johnson; and we respectfully submit that that testimony shows without any conflict whatever the following facts:

1. That the automobile of plaintiff in error which it is alleged collided with the automobile of the defendants in error was not at the time of said collision in her possession or under her management or control, but was in the sole and exclusive management and control of and was being used and operated by the defendant Armand M. d'Aleria.

Bottom of page 38 and page 39 of Transcript.

2. That at the time of said collision the automobile of said plaintiff in error was not being used or operated by the defendant Armand M. d'Aleria in the transaction of, or in connection with any business or affairs of, said plaintiff in error.

Page 50 of Transcript.

3. That at the time of said collision said automobile of plaintiff in error was being operated and used by the said defendant Armand M. d'Aleria solely and only for his own personal purposes.

Page 50 of Transcript.

4. That at the time of said collision said automobile of plaintiff in error was being operated and used by the said Armand M. d'Aleria for his own personal purposes, after he had been instructed by this plaintiff in error to take the same to the garage where she kept it.

Page 48 of Transcript.

5. That at the time of said collision the said Armand M. d'Aleria was not in the employ of this plaintiff in error as a chauffeur or to have any management or control of her said automobile, but solely and only as a musician, and that in operating and using said automobile, he was not acting within the scope of any employment in which he was engaged by plaintiff in error.

Bottom page 50 and top of page 51 of Transcript.

The entire testimony of these witnesses will be found on pages 38 to 56, inclusive, of the transcript of record on file herein; and we respectfully submit that in the light of the law applicable thereto, which is hereinafter referred to, there is no justification whatever for the verdict rendered by the jury in this case against this plaintiff in error.

Law of the Case.

I.

THAT THE EVIDENCE INTRODUCED AT THE TRIAL OF SAID CAUSE WAS, AND IS, INSUFFICIENT TO JUSTIFY THE VERDICT OF THE JURY IN FAVOR OF THE PLAINTIFFS THEREIN AND AGAINST THIS PLAINTIFF IN ERROR.

That the verdict of the jury based upon the evidence to which we have referred receives no justification whatever in law, we respectfully submit is conclusively established by the following authorities:

1. General principles of law which are applicable to the facts:

“*Master not liable where servant acts outside of the scope of his employment and authority.*—The rule, moreover, implies that the master will not in any case be liable for wrongs committed by the servant while not acting about the master’s business; or, what is substantially the same thing, while not acting within the scope of his authority. This rule is so reasonable that the grounds on which it rests need scarcely be suggested. In all the affairs of life, men are constantly obliged to act by others; but no one could venture so to act, if the mere circumstance that he employed another to act for him without any general or particular business made him an insurer against all wrongs which such person might possibly commit during the period of such employment. The law does not even put a father under such an onerous responsibility in respects of the torts of his minor child, nor was the master so answerable for his slave; although upon grounds of public policy a husband is at common law liable civiliter for the torts of his wife, and will not be heard to deny that she acted under coercion when the act was done in his presence. But in other cases, where the relation of master and servant subsists by virtue of contract, and the servant instead of doing that which he is employed to do does something which he is not employed to do at all, the master cannot be said to do it by his servant, and the maxim *qui facit per alium facit per se*, does not apply. In other words, if the servant steps aside from the master’s business, for how short a time soever, to commit a wrong not connected with such business, the relation of master and servant will be deemed to have been for the time suspended; the act will be treated as the per-

sonal act of the servant, and he alone will be responsible for it."

I Thompson on Negligence, Sec. 525.

"Test by which to determine whether servant acts within the scope of his employment. The test by which to determine whether the master is liable for the tortuous acts of his servant is not whether it was done during the existence of the employment, that is to say, during the time covered by the employment, but whether it was done in the prosecution of the master's business. Upon this subject, it has been said: 'In determining whether a particular act is done in the course of the servant's employment, it is proper first to enquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master *pro tempore*, the master is not liable. If the servant steps aside from the master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended'. Such, variously expressed, is the uniform doctrine laid down by all authorities."

I Thompson on Negligence, Sec. 526.

"When the owner is not liable for injury caused by his automobile. It is well settled that the master is not liable for the acts of his servant done outside of the scope of his employment.

So, the owner of an automobile is not liable for damages caused by its negligent operation when he was not in the possession or control of the machine, and the operator was not acting as his servant at the time of the accident.

Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master.

If the act was done while the servant was at liberty from his service and pursuing his own ends exclusively, the master is not responsible; even though the injuries complained of could not have been committed without the facilities afforded by the servant's relation to his master.

Thus, where a servant was on a private pleasure trip of his own, and was using his master's automobile, with the master's knowledge and consent, and while driving the same on the public streets negligently ran into and injured a person, the servant, and not the master, was liable.

A complaint which alleged that the plaintiff was injured by the negligent operation of an automobile owned by defendant and operated by a named chauffeur, but which did not allege that the chauffeur was a servant of the defendant, and acting in that capacity at the time, was held not to state a cause of action.

An automobile is not such a dangerous instrumentality that the owner is liable for its mere use by a chauffeur for purposes purely his own; nor is the owner liable merely because of his ownership of the car, nor because his car was operated by his chauffeur.

So, the owner of an automobile not in the possession, control, or management of it, and the chauffeur of which was not acting as his servant, at the time it is negligently caused to injure another, is not liable therefor.

Where the servant engages in some independent purpose, not connected with the service for which he is employed, the master cannot be held responsible for his conduct.

In the delivery of an opinion in a late case it was remarked that, 'It may be that it would be wise and in the public interests that responsibility for an accident caused by an automobile be affixed to the owner thereof, irrespective of the person driving it, but the law does not so provide'."

Sec. 1038, Berry on Autos, Third Edition, and numerous cases cited.

Stevenson v. S. P. Co., 93 Cal. 558:

In this case it was held:

"When a servant acts without any reference to the service for which he is employed and not for the purpose of performing the work of his employer but to effect some independent purposes of his own, the master is not responsible for either the act or omission of the service. The test of the master's responsibility for the act of his servant is whether or not the act was done in the prosecution of the business that the servant was employed by the master to do or in the execution of the authority given by the master and for the purpose of performing what the master has directed, and if so the master will be responsible whether the wrong done be occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner."

Clark v. A. T. & S. F., 164 Cal. 363:

In this case it was held that a promise of the engineer of the railroad company to a fireman that he would stop at a place where he had no right to stop, and let the fireman off the train, was a promise to make which he had no authority and that said engineer failing so to do and the fireman, thinking that

he would stop, having jumped off the train and injured himself, created no liability against the railroad company.

2. Automobile cases where these principles are applied.

A. Cases decided by Courts of States other than California.

Clark v. Buckmobile, 94 N. Y. S. 771:

In this case the general manager of an automobile company took a day off and went out of town. On his return, he telephoned from the depot and requested an employee of the company to come to the depot for him with an automobile. This was done and on the way from the depot an accident happened. Suit was brought against the owner of the automobile and judgment was rendered in favor of the plaintiff. On appeal the judgment was reversed and in the opinion the Court stated, that the evidence showing that at the time the accident occurred the persons using the automobile were not engaged in any business of the company and were not acting within the scope of their employment as employees of the company no liability existed against said company.

Reynolds v. Buck, 103 N. W. 946 (Iowa):

In this case, the defendant's automobile was being used by his son, who was also a clerk in his employ, while off on a holiday. Through the negligence of the son, the plaintiff was injured, and he brought suit against the owner. The Court held that inasmuch as the son was not using the automobile in

connection with the business of his father, but for his own purposes, the father was not liable.

Slater v. Advance, etc., 107 N. W. 133 (Minn.):

In this case, the facts were that a corporation furnished one of its agents an automobile for his own use in expediting defendant's business, and the agent after business hours used the automobile for his own purposes not connected with his master's business. Held the defendant was not liable for an injury caused by the agent's negligence as such use of the automobile was not within the scope of the agent's employment.

Evans v. Dike Auto. S. Co., 101 S. W. 1132 (Mo.):

Here the facts were that the servant of an owner of an automobile was about to leave it at a garage to be sold on commission and at the request of the servant of the owner of the garage retained it until the following day, which was Sunday, so as to enable the owner of the garage to show the automobile to a prospective purchaser. While the garage owner's servant was using the automobile on Sunday, solely for his own amusement and pleasure, by reason of his negligence he was struck by an electric car which demolished the automobile. Held the garage owner was not liable therefor, as his servant was using the automobile for his own pleasure, and not within the scope of his employment.

Stefan v. McNaughton, 124 N. W. 1016 (Wis.):

In this case, a chauffeur employed by the owner of an automobile to care for a machine and operate

it at the request and direction of the owner or any member of his family, used the automobile to go home for his midday meal, and while so doing an accident occurred. Held he was not acting within the scope of his employment and his employer not liable.

Danforth v. Fisher, 71 Atl. 535 (N. H.):

Here it was held that the owner of an automobile is not liable for the act of his chauffeur in colliding with a team on a highway, where at the time of the accident the chauffeur was returning from an errand of his own to reach the place where he had been directed to take the machine at an appointed time.

Fleischner v. Durgin, 93 N. E. 801 (Mass.):

Here it was held that an owner of an automobile who employs his chauffeur to take a car from the garage to a repair shop, is not liable for injury inflicted upon a stranger by the negligent handling of the car by the chauffeur while he was gone on an errand of his own.

Powers v. Arnold, 126 N. Y. S. 839:

Here an automobile was used by a company to carry its employees to their place of employment. At the time of the accident complained of, it was being used by an officer of the company for a pleasure trip. Held the owner of the automobile not liable as the officer was not using it in the course of his employment.

Symington v. Sipes, 88 Atl. 134 (Md.):

Here it was held that the owner of an automobile is not liable for injury caused by a collision of the car with a vehicle on the highway, while said automobile was in charge of the owner's chauffeur, and being used by said chauffeur for his own pleasure.

Reilly v. Connable, 108 N. E. 853 (N. Y.):

Here the owner's chauffeur, after driving the owner about in said owner's automobile, took the automobile to the garage with the intention of putting it up there, when his wife met him, and asked him to go to a meat market and get some meat. He started off for the market, about 1½ miles away, and while using it for his own purposes an accident occurred. Held that the owner was not liable, even though the chauffeur had taken and used said automobile by and with the knowledge and consent of said owner.

Hartnett v. Gryzmish, 105 N. E. 988 (Mass.):

In this case, the plaintiff was injured by a collision between an automobile of the defendant, driven by his chauffeur, and a bicycle upon which plaintiff was riding. The chauffeur had taken the car from the garage at noon to go to his home for dinner and, after having eaten his dinner was going from his house to the house of the defendant in order to take the defendant's mother out for a drive, when the collision occurred. The trial Court ordered a verdict for the defendant and the Supreme

Court affirmed it on the ground that at the time of the accident the chauffeur was not acting as an employee of the defendant.

Miller v. National Auto S. Co., 177 Ill. Appeal 367:

In this case it was held that where the president of a corporation engaged in selling automobiles was driving one of its cars to his home after business hours and ran into a truck injuring the plaintiff and it was shown that he was not at the time engaged in the business of the corporation or within the scope of his employment, that the corporation was not liable, and the Court further held in this case that to hold a master liable for a tort committed by his servant, it must appear that at the time of the injury, the servant was engaged in the master's business and not upon some private personal matter of his own; that is, the injury must have been inflicted in the course of the servant's employment.

Bursch v. Greenough, 139 Pacific 870 (Wash.):

Here an employee of the defendant, after business hours, took one of the company's motor trucks without permission and took a ride therein solely for his own pleasure, and while so doing an accident occurred. Held he was not acting within the scope of his employment.

State v. Benson, 100 Atl. 505 (Md.):

Here one Soper, an employee of the defendant, was instructed by a superior employee to take defendant's automobile from the garage to the place of

business of defendant each morning and in the evening to take it back to the garage. On the evening of the accident, Soper took another employee in the car with him and ostensibly started to the garage with the car but instead of going to the garage with it, he went on down to the city where he and his associate had their dinner. On their return an accident occurred. Held the owner of the car was not liable because the employees were not acting within the scope of their employment.

Goodrich v. Musgrave, 135 N. W. 58 (Iowa):

Here it was held that where a man was allowed to take an automobile with a view to showing it to a possible purchaser, and, after having done so without selling it, to keep it several days without further authority and during which time while using it for his own purposes he negligently injured the plaintiff, there was no such relation of agency or of master and servant as would make the owner liable.

B. Cases decided by the Supreme Court and the Appellate Court of the State of California.

Stoddard v. Fiske, 170 Pac. 663 (35 Cal. App. 60):

Here the driver of a loaned automobile was arrested for speeding and taken to a police station. His friend, riding with him, took the automobile to go to the central police station to deposit bail and secure an order for the driver's release, and, returning from such errand, ran into and injured a woman. Held the arrested driver was not liable for the injury.

Mullia v. Ye Planary Bldg. Co., 32 Cal. App. 6
(160 Pac. 1008):

In this case, it was held that a building company is not liable for the act of its superintendent of construction in running an automobile furnished him by the company for use in the company's business into a taxicab where such collision occurred while such employee was returning at an early hour in the morning from a country club to which he had driven after the theatre. In this case the Court quoted with approval the following language:

“The test of the master's responsibility for the act of his servant is whether or not the act was done in the prosecution of the business that the servant was employed by the master to do or in the execution of the authority given by the master and for the purpose of performing what the master had directed.”

Mauchle v. Panama-Pacific etc., 37 Cal. App. 715
(174 Pac. 400):

In this case it was held that the Panama-Pacific International Exposition Co. was not liable for personal injuries sustained by a pedestrian from being run down by an automobile owned by the company and negligently driven by the superintendent of the grounds, where at the time of the accident the superintendent was on his way home with the machine from the exposition grounds, the machine remaining at his home until it was returned to the grounds where it was usually kept all night; since, under such circumstances, such superintendent was

not using the machine at the time of the accident upon any business or affair of the exposition company.

Martinelli v. Bond, 42 Cal. App. 209 (183 Pac. 461) :

In this case it was held that the owner of an automobile was not responsible for an accident which occurred while it was being used by the manager of said owner's business, but not within the scope of his employment as such manager. In the opinion of the Court the following language is used :

“The test of the owner's liability for the tortuous act of his employe while driving the former's automobile is the nature of its use at the time of the accident; whether or not it is then being used in the transaction of the owner's business. The very basis of the rule *respondeat superior* as applied to automobile accidents is that the driver of the machine is acting for the owner and not for himself personally at the time of the accident. As soon as the driver steps aside from the owner's business and interest upon the performance of some independent purpose of his own, he ceases to act as agent of the owner and the latter's responsibility for his acts terminate.

* * * * *

Upon principle and authority, neither the ownership of the automobile by appellant, nor the fact that the use and care of the same were intrusted by appellant entirely to the defendant Noonan renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with appellant or his business.”

In this case it was contended that as a *prima facie* case was made against Mr. Bond by showing that he was the owner of the automobile in question, that plaintiff was entitled to a verdict, but in passing upon this the Appellate Court uses the following language:

“It is further contended by respondent that he made a *prima facie* case against the appellant by proof of the latter’s ownership of the automobile and the fact that the driver Noonan was his employe at the time of the accident. The presumption arising from such *prima facie* case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. (*Maupin v. Solomon*, 41 Cal. App. 323 (183 Pac. 198); *Brown v. Chevrolet*, 39 Cal. App. 738 (179 Pac. 697).) In this case there is no conflict in the evidence as to the fact that at the time of the accident the automobile was in use by the employe for his personal pleasure. Uncontradicted proof of that fact dispelled the presumption of liability on the part of the owner.”

Hirst v. Morris, 187 Pac. 770 (Cal.):

Here it was held that where a chauffeur who had purchased an automobile from his employer to be paid for in installments and to be used in the employer’s business advertising and selling its products, had no samples or advertising matter with him and no duties to perform when he drove to his home in another town where he collided with plaintiff, he was not acting within the scope of his employment so as to render the employer liable.

Fahey v. Madden, 206 Pacific 128 (California Appellate Court):

Here it was held in an action for damages for personal injuries caused by being struck by a borrowed automobile, that the inference of agency between the owner of the automobile and the borrower arising from the former's ownership, and the permissive use of the automobile, and creating a prima facie case of agency, does not create a substantial conflict as against clear, positive and uncontradicted evidence to the contrary; and under such circumstances it is error to submit the case to the jury as far as the liability of the owner of the automobile is concerned.

Maupin v. Solomon, 41 Cal. App. 323:

In this case the following language was used by the Court:

"It is not denied, as testified to by the witnesses introduced by appellant, and corroborated by the surrounding circumstances, that at the time of the accident Solomon was engaged in a pursuit wholly his own, and that such use of the automobile was without the consent of and against the instructions of appellant. Nor is it disputed that the accident was the result of the negligence of Solomon. But plaintiff's contention in support of the judgment is that when he proved that the automobile belonged to the appellant and was being operated by its employee at the time of the collision, a presumption arose that the employee was acting within the scope of his employment, and that such presumption remained in the case in spite of the clear, positive, and

uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, with the result that the action of the court in denying a motion for a new trial must be sustained upon appeal.

With this position we cannot agree. The inference relied upon by respondent cannot be indulged under the circumstances of this case. It must yield to the direct and unequivocal evidence rebutting such inference. 'Presumptions' such as the one relied on here, 'are allowed to stand not against the facts they represent but in lieu of proof of facts, and when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply overcome and dispelled'. (*Savings & Loan Soc. v. Burnett*, 106 Cal. 514 (39 Pac. 922).) The authorities in this state abundantly support this view. (*Freese v. Hibernia etc. Soc.*, 139 Cal. 392 (73 Pac. 172); *King v. Hercules Powder Co.*, 39 Cal. App. 223 (178 Pac. 531); *Mullia v. Ye Planary Building Co.*, 32 Cal. App. 6 (161 Pac. 1008); *Mauchle v. Panama Int. Exp. Co.*, 37 Cal. App. 715 (174 Pac. 400).)

The very recent case of *Brown v. Chevrolet Motor Co. of California*, 39 Cal. App. 738 (179 Pac. 697), in an essential respect is like this case. There a travelling salesman employed by the defendant borrowed its automobile for a pleasure excursion, and while so using it injured the plaintiff. There, as here, the plaintiff contended that he had made out a prima facie case when he had shown that the automobile belonged to the defendant, and that it was the province of the jury to weigh any evidence in conflict therewith; but the court held that a nonsuit had been properly granted, and, quoting from the case of *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435 (Ann. Cas. 1918 B, 540, 113 N. E. 507), said: 'The presumption growing out of a prima facie case

* * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely on it.

In the last analysis respondent's position is in effect that, granting the evidence introduced by appellant rebutting the presumption relied upon is convincing and uncontradicted, it merely creates a conflict in the evidence, and that a finding of the jury in accordance with the presumption is under those circumstances supported thereby. This we think is not the law.

The judgment is reversed."

Gouse v. Lowe, 41 Cal. App. 715:

Here it was held, as seen by the syllabus in the case, which in every way is supported by the facts in the decision, as follows:

If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he is using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reasons of his relations to his master.

Where the servant takes his master's machine for a junketing or business trip of his own, the trip is not complete until his return to the point of de-

parture, or to a point where in the performance of his duty he should be.

While ordinarily the question of whether or not the act was within the scope of the servant's employment should be submitted to the jury, where the only evidence is that at the time of the injury the servant was upon a trip for his own purposes contrary to his master's orders, a motion for a directed verdict should be granted. It is only where reasonable men may differ in regard to the facts that a case should go to the jury. If the facts are admitted, or are susceptible of but one meaning, it becomes the duty of the judge to declare the law upon the admitted facts.

C. As to cases decided by the Federal Courts.

From the examination we have made, while there are many cases decided by the Federal Courts to the effect that to hold the master for the acts of his servant, it must be shown that the servant was acting within the scope of his authority, we have been able to find but one case dealing with the liability of the owner of an automobile, which is as follows:

Patterson v. Kates, 152 Fed. 481:

In this case the facts were as follows: The defendant owned an automobile, which broke down on the way from Atlantic City to Philadelphia, and which he then left in charge of his driver, with instructions to repair it, and bring it to Philadelphia. After the driver had reached the Delaware River,

and while waiting for a ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making such trip, through his negligence in running too fast, he came into a collision with a horse and wagon on the highway, by which plaintiffs were injured. Held that, under such facts, the defendant was not liable for the injury.

3. Even though the automobile of this plaintiff in error was being used by the defendant Armand M. d'Aleria at the time of the accident complained of, by and with her consent (and it will be remembered that she not only testified that she instructed him to take it up to the garage and leave it there [bottom of page 40 of transcript] and the defendant d'Aleria admits that he was so instructed by her, but told her that he was going down to Market Street, and then would take the car to the garage [page 48 of transcript]) she would still not be liable for any negligence upon his part.

On this subject, see the following authorities:

- A. Cases decided by Courts other than those of the State of California.

Davies v. Anglo Auto T. Co., 145 N. Y. S. 341:

Here it was held that where the owner of an automobile permitted his chauffeur and certain companions to use it for pleasure, and, while so doing, the plaintiff was injured by the chauffeur's negligence, the owner was not liable.

Reilly v. Connable, 108 N. E. 853 (N. Y.):

Here it was held that the fact of the defendant having given to the chauffeur the right to use

defendant's automobile for the purposes of said chauffeur would not make the owner liable for injuries caused by said chauffeur's negligence in so doing.

Cunningham v. Castle, 111 N. Y. S. 1057:

Here it was held that the master is not liable for an injury inflicted by his automobile while being used by his chauffeur with the knowledge and consent of the master for a private pleasure trip of the chauffeur.

Hartley v. Miller, 130 N. W. 336 (Mich.):

Here it was held that the owner of an automobile is not liable for its negligent use to the injury of a stranger by one to whom said owner had loaned it; the person to whom it was loaned being in full control of said machine at the time of the accident complained of.

Lewis v. Amorous, 59 S. E. 338 (Ga.):

Here it was held that where the owner of an automobile merely permits another to use it, no relation of principal and agent is established, such as to render the owner liable for an injury resulting from the other's negligence in the use of the machine.

Siegel v. White, 142 N. Y. S. 318:

An automobile company is not liable for an injury caused by an automobile while being driven

by an employee to whom it had been loaned for personal use, since he was not at the time acting as the owner's servant.

Armstrong v. Sellers, 62 So. 28 (Ala.):

Here it was held that the owner of an automobile is not in the absence of a statute liable for an injury which occurred while said automobile was being used by a person who was accorded the privilege of using it by the owner when it was not otherwise engaged.

Scheel v. Shaw, 97 Atl. 685 (Pa.):

Here the facts were that the defendant's chauffeur requested defendant to lend to him defendant's automobile to go for his family some four miles away, which permission was granted and on the return trip the chauffeur struck and injured the plaintiff. Suit was brought against the defendant and on defendant's motion nonsuit was granted.

N. B. A very large number of cases are cited in the opinion in this case.

Bogorad v. Dix, 162 N. Y. S. 992:

Here it was held the law does not prohibit the owner of an automobile from lending it to his chauffeur for any lawful purpose and the owner is not liable for damages while the machine is so used.

Ostrander v. Amour, 161 N. Y. S. 961:

Here it was held that the defendant was not liable for injuries caused by the driver of a motor truck belonging to defendant which had been loaned to the driver for purposes entirely outside of defendant's business.

B. Cases decided by the Supreme Court and Appellate Court of California.

Stoddard v. Fiske, 170 Pac. 663 (35 Cal. App. 607):

Here the driver of a loaned automobile was arrested for speeding and taken to a police station. His friend, riding with him, took the automobile to go to the central police station to deposit bail and secure an order for the driver's release, and, returning from such errand, ran into and injured a woman. Held the arrested driver was not liable for the injury.

Brown v. Chevrolet, 39 Cal. App. 728 (179 Pac. 697):

Here it was held that the relation of principal and agent between the owner of an automobile and the driver, making the owner liable for driver's negligence, does not result from the mere operating of the machine by the driver though he is an employee performing duties in another part of the state.

In deciding this case the Appellate Court used the following language:

"The liability of an owner of an automobile for the negligence of its driver depends

upon the existence of the relation of principal and agent between the two. This relation does not result from the mere operating of such automobile, hence it is uniformly held that the owner is not responsible for injuries resulting from the negligence of a driver whose only relation to the owner is that of borrower."

Hall v. Puente, 191 Pac. 39 (Cal.):

Here it was held that the doctrine of *respondereat superior* cannot be invoked unless at the time of the negligent act causing the injury, the servant was engaged in performing a service for the master, or incidental thereto; that where an oil company loaned to its salesman for his own use an automobile which he used in the course of his employment, the consent of the company to such personal use did not render it liable for negligent injuries to a pedestrian.

Spence v. Fisher, 193 Pacific 255 (California Supreme Court):

Here it was held that a father was not liable for the negligence of an adult member of his family who was using the father's automobile by and with the consent of the father. (In this case a great many authorities are cited by Judge Angellotti, who was then Chief Justice of the Supreme Court of California, and rendered the decision in question in support of the law as in said decision laid down.)

We respectfully submit, therefore, in the light of the law as above referred to, and of the facts as hereinbefore set forth and stated:

1. That the evidence introduced at the trial of said cause was, and is, insufficient to justify the verdict rendered by the jury;

2. That the plaintiff in error having requested the Court to instruct the jury to render a verdict in her favor, and against the plaintiffs in said cause, on the evidence introduced, which instruction the Court refused to give, and said plaintiff in error having taken exception to such refusal, she is at this time entitled to have this Court pass upon the question as to whether or not the evidence was sufficient to justify the verdict.

In addition to the foregoing authorities, there is one other case to which we desire to direct the particular attention of the Court and that is the case of *Ritchie v. Waller*, 63 Conn. 155, upon which the learned judge of the trial Court places so much reliance in the opinion rendered by him denying the motion of this plaintiff in error for a new trial.

That case, we respectfully submit, not only fails to support that opinion, but is squarely in opposition thereto as your Honors will note on a careful reading of the decision rendered therein; for there it is held that

“Where there is not merely a deviation, but a total departure from the course of the master’s business, so that the servant may be said to be ‘on a frolic of his own’, the master is no longer responsible for the servant’s conduct.”

And the evidence introduced at the trial of this case shows without any conflict whatever both an absolute departure by the defendant Armand M. d'Aleria from the course of any employment in which he was engaged by this plaintiff in error—and from the instructions given to him by her—and that at the time of the accident complained of he was in fact “on a frolic of his own”. In other words, the facts in *this case* bring it squarely within the law as laid down in *that*; and on the strength of that case alone, the trial Court should have instructed the jury to render a verdict in favor of this plaintiff in error and against the plaintiffs in said cause.

While it is true that in that case the master was held responsible for the acts of his servant, on an examination of the facts there involved, it will be seen at a glance how different they are from those involved in this action.

There the servant was in the act of carrying out the instructions of the defendant at the time the accident complained of occurred, while *here* Armand M. d'Aleria was violating the instructions given to him by plaintiff in error at the time the accident here complained of occurred. *There* the servant of the defendant had gone from defendant's farm at the request of defendant, with a span of horses and wagon, for the purpose of obtaining for said defendant a load of manure, and on the way back to the farm stopped his horses and wagon for a moment in front of a shoe

store into which he went to have his shoes repaired. While he was in the shop the horses started off on a slow trot and, when in front of the premises of plaintiff, one of the wheels of defendant's wagon caught in one of the wheels of plaintiff's wagon and upset it, causing the injury and damage complained of. On these facts, the Court held that at the time of the accident, defendant's servant was acting in the course of his employment, and that the mere stopping for a moment to go into the shoe store was not a sufficient departure to relieve defendant from responsibility for the accident.

But even that decision is against the weight of authority, as will be seen from the cases referred to on pages 8 to 30 hereof, and is in direct opposition to the holding of this Court in the case of *Patterson v. Kates*, 152 Federal 481, referred to on page 24 hereof. How different are the facts in *Ritchie v. Waller* from those involved in this action! *Here* the defendant d'Aleria had been instructed by this plaintiff in error to take her automobile from the St. Francis Hotel, which is on the west side of Powell Street between Post and Geary Streets, to the garage at 735 Post Street, which is on the south side of Post Street between Jones and Leavenworth Streets, and instead of so doing he goes in exactly the opposite direction, south to Market Street and thence out Turk Street and Golden Gate Avenue for a ride, and at the time of the accident was at Gough Street and Golden

Gate Avenue, a distance of some seven blocks to the west and six blocks to the south of the garage where plaintiff in error had instructed him to take her automobile—and *on a frolic of his own*, that is for the purpose of taking a ride with his friend Harry Hume, and at the time of the accident was on his way to the Fairmont Hotel and not to said garage.

See bottom of page 48 and page 49 of Transcript.

It would seem to us, however, that the strongest point in favor of the contention of this plaintiff in error that the evidence is insufficient to justify the verdict is the fact that the verdict is in direct opposition to the law as laid down in the decisions referred to on pages 17 to 28 hereof. By those decisions, the law in the State of California is established, and as stated by the Supreme Court of the United States,

“It is the duty of a Federal Circuit in cases where the State decisions are controlling to take the law as last decided by the highest State court without attempting to determine on the merits between it and a previous contrary decision by the same Court.”

Leffingwell v. Warren, 67 U. S. 599;

Mitchell v. Lippincott, Fed. Cas. No. 9665,
affirmed in 94 U. S. 767;

Gaugler v. Chicago, etc., 197 Fed. 79.

II.

THAT THE VERDICT OF THE JURY WAS, AND IS, AGAINST LAW.

The verdict, we respectfully submit, that was rendered by the jury in this case, is not only not in accordance with the instructions given to the jury by the Court, but is squarely against such instructions, and because of that fact, said verdict is against law.

Emerson v. Santa Clara County, 40 Cal. 543:

Here it was held, a verdict of a jury in disobedience to the instructions of the Court, even though the instruction itself was not correct in point of law, is a verdict against law.

Sweeny v. Central Pacific, 57 Cal. 15:

Here it was held that where a new trial is asked on the ground that the verdict is against law, and it appears that the jury must either have disregarded the law as given in the instructions of the Court, or else have found a fact wholly contrary to the evidence, the verdict is against law and it is proper to grant a new trial on that ground.

Aguirre v. Alexander, 58 Cal. 21:

On page 30 of the opinion in this case, it is stated as follows:

“The fact with which we have to deal is that the jury by their verdict disregarded the instructions of the Court; and for that reason alone, it was the duty of the Court to set aside

the verdict whether the instruction was right or wrong."

DeClez v. Save, 71 Cal. 552:

Here the Court held a verdict contrary to an instruction of the Court upon a point of law is a verdict against law.

We might add, however, that the foregoing cases have been modified to the effect that in later cases it is held that if an instruction given to a jury is in fact erroneous, a failure to render a verdict in accordance therewith is not a verdict against law.

The instructions given by the Court to the jury, which we contend are squarely in opposition to said verdict, are as follows:

"I further charge you, gentlemen of the jury, as a matter of law, that the driver of this car did not interpose any defense in this action, so that, so far as he is concerned, the only question you need to consider is the amount or measure of damages to which the plaintiffs are entitled. The liability of the other defendant depends upon the purpose for which the car was being used at the time of the accident, and upon the relationship that existed between the owner of the car and the driver. Upon this question I charge you as follows:

If you believe from all the evidence in the case that at the time of the accident in the amended complaint herein referred to, the automobile therein mentioned was in the possession of and under the control of the defendant Adrian, and was being operated by him for his own purposes and not in the transaction

of any of the duties of his employment with the defendant Mrs. Nixon, and that while so operating said automobile the plaintiffs were, or either of them was, injured or damaged, in such case the defendant Mrs. Nixon cannot be held legally responsible for any such injuries or damages. In other words, gentlemen of the jury, the master is liable for the acts of his agent or servant in the course of his employment, and within the scope of the agent's authority, but the master is not liable for acts committed by the agent not in the course of his employment and not within the scope of his authority. If in this case this machine was driven for the purpose of the owner by this driver then she is liable for his acts and for his neglect. If, on the other hand, it was not driven for her purposes, or in her business, there can be no recovery, even though it was used by the driver with her consent."

As to this, the evidence shows, as we have hereinbefore demonstrated, without any contradiction whatever, that at the time of the accident complained of the automobile in question was in the possession and control of the defendant Adrian and was being operated by him for his own purposes; that the owner of said automobile did not then know that it was being used by the defendant Adrian at the time the accident occurred; that she never gave her consent to the said Adrian to use said automobile at the time or for the purpose it was being used when the accident in question happened. Therefore, we respectfully submit, the verdict is in direct opposition to the instruction above quoted and such being the case, it was and is against law.

III.

**AS TO ERRORS OF LAW OCCURRING AT THE TRIAL OF SAID
CAUSE AND DULY EXCEPTED TO BY THIS PLAINTIFF IN
ERROR.**

The only error occurring at the trial of said cause, and excepted to by the defendant, upon which we desire to rely is that which we respectfully submit was committed by the Court in its refusal to give to the jury the following instruction requested by the said defendant Mrs. Nixon:

“You are hereby instructed that the plaintiffs above named have failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon you find a verdict in her favor and against the plaintiffs.”

This instruction was not given by the Court, and at the conclusion of the instructions which were given by the Court, the following proceedings were had and taken:

“MR. MILLER. We desire to take an exception, if the Court please, to the fact that the Court did not give the instruction requested that the jury find in favor of Mrs. Nixon.

THE COURT. Yes.”

That instruction, we respectfully submit, was one to which the said defendant Mrs. Nixon was entitled, in view of the testimony presented to the jury to which we have hereinbefore referred, and in view of the law applicable to that testimony, which has hereinbefore been called to your Honor's attention.

In conclusion, we respectfully submit that for all of the reasons hereinbefore set forth, the judgment made and entered in the above entitled cause in favor of the plaintiffs therein and against this plaintiff in error should be reversed, and that the trial Court should be directed to make and enter judgment in said cause in favor of this plaintiff in error and against the defendants in error.

Dated, San Francisco,
September 20, 1922.

MILLER, THORNTON & MILLER,
W. I. GILBERT,
Attorneys for Plaintiff in Error.

No. 3895.

17
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

KATE I. D'ALERIA,

Plaintiff in Error,

vs.

CHARLES SHIREY and JENNIE

SHIREY, his wife,

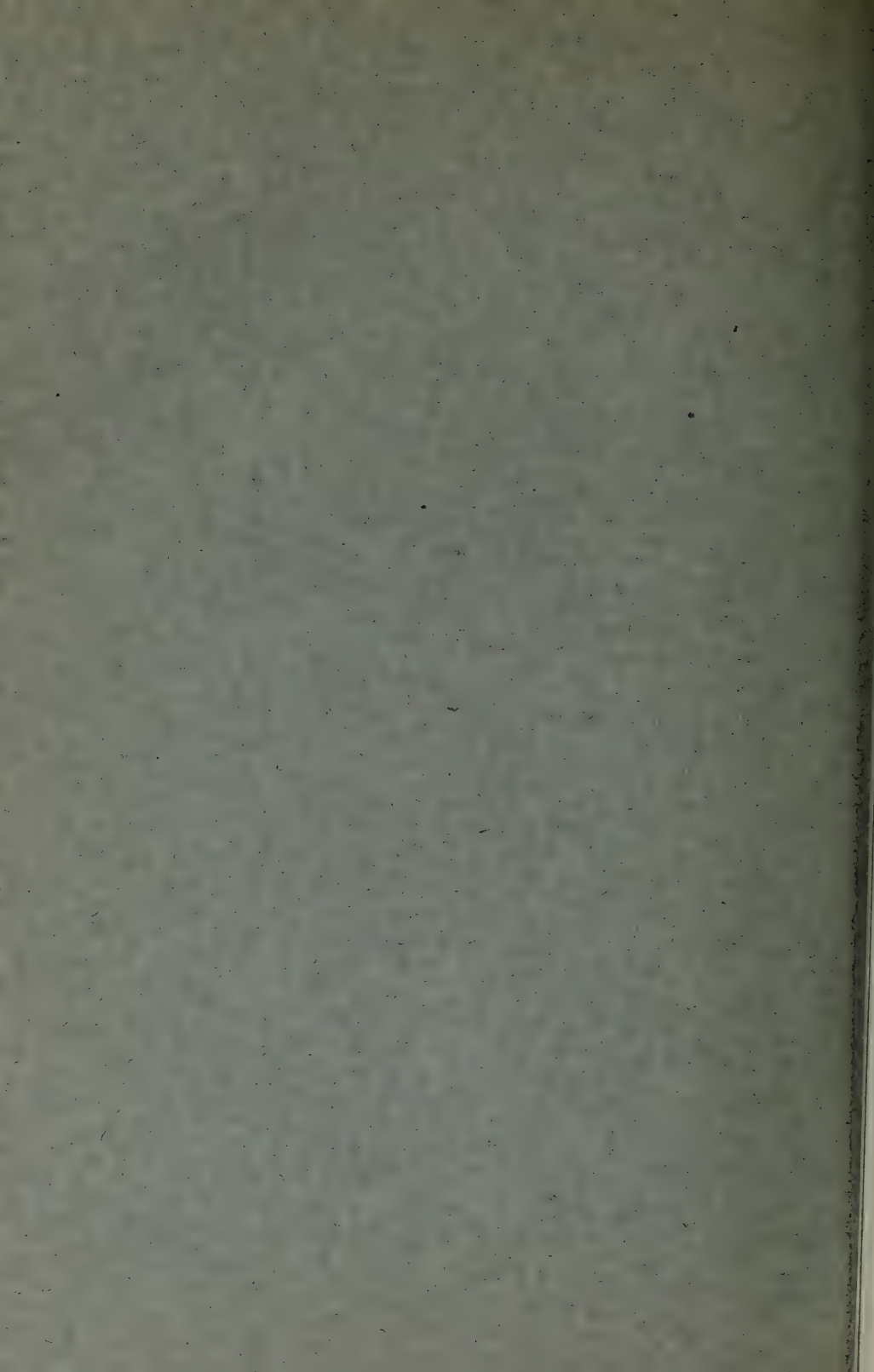
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

W. C. CAVITT,

Attorney for Defendants in Error.

FILED



United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

KATE I. D'ALERIA,

Plaintiff in Error,

VS.

CHARLES SHIREY and JENNIE

SHIREY, his wife,

Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

It should be noticed that plaintiff in error on page 2 of her brief states the fact that no answer was ever filed on behalf of the defendant Harold A. Adrian, or under his true name, Armand M. d'Aleria, and that no appearance was made for or on his behalf at the trial of the cause. That statement is correct, but it is also a fact that both defendants under the names of Harold M. Adrian and Kate Nixon filed a special demurrer to the plaintiff's amended complaint, which demurrer was sustained by the court. Thereafter the order sustaining this demurrer was set aside by the court and then withdrawn on the stipulation of the attorneys for both defendants, Messrs. Miller Thornton Watt & Miller. Their counsel filed an answer only for Kate I. d'Aleria.

A supplemental complaint was filed on behalf of the plaintiff's setting forth that the true name of Harold A. Adrian was Armand d'Aleria and that under his true name he married Kate I. Nixon and that their true names now are Armand d'Aleria and Kate I. d'Aleria (husband and wife) and commonly called Count and Countess d'Aleria. (Page 22, Transcript.)

All of the evidence heard by the jury in this case is not printed in the Transcript of the record, and is not before this court on this writ of error.

Plaintiff in error in her brief, commencing on page 7 to and including page 36 inclusive, devotes all of those pages as to what the evidence before the jury was, and is, upon which the jury rendered its verdict in this case. There appears in the record now before this court as hereinbefore stated only a small part of the evidence heard by the jury, upon which the jury based its verdict.

There was but one exception taken by the plaintiff in error during the trial of the cause, which appears in the Transcript of the Record on page 64 of the Transcript, and the only exception upon which plaintiff in error is entitled to be heard in this court to set aside the verdict and judgment. It is so admitted by plaintiff in error on page 37 of her brief. This error is based on the refusal of the court to give an instruction to the jury for a directed verdict.

Atlantic Ice & Coal Corporation vs. Van, 276 Fed. 647, Court held that

“No exceptions were taken to charge of the court or to its rulings upon the admission or rejection of evidence; therefore the only question presented by this record is whether or not the court erred in overruling the motion of the defendant, at the close of all of the evidence, for a directed verdict.” (2) “A court has no authority to direct a verdict, where a consideration of all the evidence, and the inferences reasonably and justifiably to be drawn therefrom would sustain a verdict for the opposing party. (P. 648.) If the evidence is such that reasonable minds may arrive at different conclusions, then it is the duty of the trial Court to submit the issues of fact to a jury” . . . “nevertheless the question of the credibility of witnesses is a question for a jury. If the jury believed the witnesses offered by the plaintiff, as it evidently did, then the plaintiff fully met this burden.”

That is the burden of proof. The court refused the following instruction as requested by plaintiff in error. (Page 70 of Transcript.)

“You are hereby instructed that the plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, and you are hereby directed that as to the said defendant Mrs. Nixon, you find a verdict in her favor and against the plaintiffs.”

The instruction for a directed verdict was fully covered by the charge of the court as given to the jury. (Page 63 of Transcript.)

In the above requested instruction the court was requested to instruct the jury that the

“plaintiffs above named failed to make any showing in this case to entitle them to a judgment against the defendant Mrs. Nixon, etc.”

The court did not err, we contend, in refusing to give this instruction to the jury, the instruction as offered is vague and uncertain; it was for the jury to determine this fact from all of the evidence in the case, and not that “the plaintiffs failed to make any showing against the defendant Mrs. Nixon.” The jury reached its verdict from all the evidence in the case, and not from the evidence solely as set forth in the Transcript filed herein.

All of the cases cited by plaintiff in error in her brief are cases which involved the question of negligence, master and servant, and the scope of the employment of the servant in relation to his master's business, and being within the scope of his employment at the time of the accident. The plaintiff in error, on page 7 of her brief (bottom of page), says:

“That the verdict of the jury, based upon the evidence to which we have referred, receives no justification whatever in law, we respectfully submit is conclusively established by the following authorities.”

The evidence referred to is not all of the evidence that was before the jury in this case, and all of the evidence in this case is not before this court in the Transcript. The facts and circumstances in this

case are entirely different from any facts or circumstances appearing in the decisions cited by plaintiff in error, and each case must stand upon its own facts and circumstances. In this case the evidence before the jury shows that the defendant Armand d'Aleria was living at the St. Francis hotel in San Francisco under the name of Harold Adrian at the time of the accident. It is alleged and admitted in the answer of plaintiff in error that she was the owner of the big Locomobile touring car at the time it collided with the Studebaker car at the time in question. (Page 20 of Transcript, Par. 3.) That Harold A. Adrian at the time of the accident was not in the employ of Kate I. Nixon as a chauffeur and was not at that time employed by her at all, but she selected him to drive her car and placed him in charge of her Locomobile touring car just before the accident, as established by the evidence, to take her car to the garage.

Donaghue vs. Hayden et ux, 194 Pac. 1007.

Testimony of Kate I. Nixon, Page 39, Transcript (direct):

“Q. Had you any talk with Harold Adrian shortly prior to this accident with relation to this Locomobile; and if so, state what it was?

“A. I had asked him to take it directly from the Class A Garage. . . . (Page 40, Transcript.)

“Q. Now was Adrian your chauffeur?

“A. He was not.”

The evidence shows they had been out together the evening of the accident and returned to the St. Francis Hotel after eleven o'clock.

"Q. When you got out of the car at that time, tell the Court and jury just what you stated to him?

"A. We drove to the Powell street entrance of the St. Francis, and I said to him, 'Now, you take the car up to the garage and leave it there,' that was the whole conversation.

"Q. What was Adrian's business?

"A. He played a Wurlizer organ in different theatres.

"Q. He was a musician?

"A. He was a player of the Wurlitzer organ."

Cross-examination, Page 41, Transcript.

"Mr. Adrian's real name is Armand d'Aleria.

"Q. Where were you living at that time?

"A. I was living in Reno. At the time of this accident I was living at the St. Francis and Mr. d'Aleria was living at the St. Francis Hotel. I think I had been living there about a week. Mr. Adrian drove the car that night and once or twice before. I think he drove the car once or twice while we were in Reno. . . . I now state he has only drive the car once or twice before the accident. . . . Mr. Adrian was in my employ in Reno as a musician. . . . I owned the same Locomobile touring car all the time. (P. 42, Trs.) The car had been kept by me in the Class A Garage a week or two, something like that, a week I think it was, I do not remember exactly."

Deposition of Harold A. Adrian. (Page 47 Trs.)

"My name is Harold A. Adrian, aged twenty-two years, living at 5226½ Sunset Boulevard, and am a musician; I am one of the defendants in this case and know my co-defendant sued herein as Kate Nixon and Mrs. George Nixon. . . . About 12:30 A. M. on Sunday, April 20th, 1919, I was driving and in charge of a Locomobile automobile owned by Mrs. Nixon, at or near the intersection of Golden Gate Avenue and Gough Street, in the City and County of San Francisco, . . . she had been with me in that automobile that evening when I was driving and operating the same, and she left the automobile about twenty minutes before the accident. . . . This automobile was kept in the Post Street Garage sometimes, and at other places. . . . (P. 48, Trs.) "I don't know the exact location."

"Q. 14. State whether or not, at the time Mrs. Nixon left said automobile, she gave you any instructions with relation to the same. . . .

"A. I was instructed to take the car to the garage, but first told her I was going down Market Street to see a music publisher down there by the name of Reese, and then I was going to take the car to the garage."

The jury was instructed by the court (Page 61, Trs.) in part as follows:

"In weighing the evidence you are to consider the credibility of the witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. The conduct of the witnesses, their character as shown by their evidence, their manner on the stand, their relation to the parties, if any, their degree of intelligence, the reasonableness or unreasonableness

of their statements. A witness is presumed to speak the truth; this presumption, however, may be repelled by the manner in which the witness testifies, by the character of his testimony or by testimony affecting the character of the witness for truth, honesty or integrity, or his motives, or by contradictory evidence."

No exception was taken to the charge to the jury by the plaintiff in error. The jury heard and saw the plaintiff in error on the witness stand and had the opportunity of observing her manner on the witness stand when testifying in this case. The jury were the sole judges of the credibility of the witnesses who testified in the case, and of their demeanor while on the stand. The jury heard the deposition of Harold A. Adrian read to them, and heard Mrs. Kate I. d'Aleria testify on the stand. It was for the jury to determine the degree of credence to be accorded to their testimony. The inherent improbability of their testimony may be such as to deny it all claims to be belief and may give rise to doubts as to their sincerity. The jury had the right to weigh all the evidence in the case and the jury may have believed from the evidence that the testimony of plaintiff in error and her husband, Count Armand d'Aleria, were colored, or by them not correctly stated. The jury in this case had the evidence before them that the deposition was taken in the name of Harold A. Adrian on the 7th day of February, 1921 (P. 46, Trs.), in Los Angeles, and it was also in evidence before the jury that he and Kate I. Nixon were married at San Diego, California, on the 26th day of January, 1920, and at

the time of the marriage he gave his true name as Armand d'Aleria, and after said marriage they were known as Count and Countess d'Aleria. Thus from the foregoing evidence above quoted it was for the jury to determine what credence should be given to the testimony of the plaintiff in error and her husband, Armand d'Aleria. They were husband and wife at the time the deposition was taken and had been such for more than one year at the time his deposition was taken which was read to the jury. The jury had the sole right to determine from the evidence whether he told the truth or not when he said his true name, when his deposition was taken, was Harold A. Adrian, or whether he told the truth at the time he married Kate I. Nixon that his true name was Armand d'Aleria. The credibility of these two witnesses and all other witnesses was strictly within the province of the jury. This we most respectfully submit is held to be the law by the following authorities:

Bergert vs. Payne, 274 Fed. 787. "The credibility of witnesses is peculiarly for the jury."

Gold Hunter Mining & Smelter Company vs. Johnson, 233 Fed. 849.

Hobbs vs. Kizer, 236 Fed. 685.

Atlantic Ice & Coal Co., 276 Fed. 647.

Donaghue vs. Hayden et ux, 208 Pac. 1007.

It appears from the testimony heretofore quoted that Harold Adrian at the time of the accident was

not employed by the plaintiff in error as her chauffeur. That she was not conducting or carrying on any business in the City and County of San Francisco, that she and Harold Adrian came to San Francisco from Reno about one week before the accident, that Adrian had been in her employ about three months in Reno as a musician. That both were living at the St. Francis Hotel at the time of the accident, that at that time he was about 21 years of age, that they had been out together on that evening to visit some friends, that they came back to the St. Francis Hotel at about 20 minutes before the accident. That she (plaintiff in error) instructed him to take the car to the Class A Garage, and that this was all the conversation. His evidence establishes the fact that he told her he was going down on Market street to a publishing house and he would then take the car to the garage.

No instructions were given to him by Mrs. Nixon what particular route to take to go to the garage. There is no evidence before the jury that Adrian drove this Locomobile down to the publishing house; he may have walked down there. It was for the jury to determine from the evidence how much credence was to be given to the evidence of these two witnesses, and how much conversation was had about taking the car to the garage. It appears from the evidence as herein quoted that she selected him as her agent to drive this car, to take it from the garage on the evening of the accident, and to take the car back to the garage; that he had only driven the

car once or twice before the accident. He testified he did not know the exact location of the Class A Garage. (P. 48, Trs.) This being true, he would naturally perhaps take a roundabout way in going there and was on his way to the garage when the accident happened, and he was the agent of plaintiff in error. It is contended by plaintiff in error that Adrian at the time of the accident was not in her employ, but the evidence is uncontradicted that at the time of the accident he was her agent and authorized by her to drive this car owned by her, a big Locomobile touring car, which struck the plaintiff's Studebaker car and caused the injuries of plaintiff, Jennie Shirey. It was for the jury to determine from all of the evidence in the case, and to draw inferences from the evidence as to the facts established by the evidence. The case of *Donaghue vs. Hayden*, 208 Pac. 1007, it was contended that Mrs. Hayden was not liable is on all fours with this case. Here it is insisted that plaintiff in error is not liable, but the jury determined that fact against her, likewise the trial court when it denied her motion for a new trial.

In *Newson vs. Dierks*, 194 Pac. 520, Court says:

“Here it may be said that the evidence introduced by the appellant made out a complete defense if full credence was given to it by the trial court, but the court was not bound to unreservedly accept it, even if uncontradicted. The court saw and heard the witnesses testify, and with this advantage, not enjoyed by us, it was for it to determine the degree of credence to be accorded to this testimony. It is not

essential that the credulity of the court should correspond with the positiveness with which a witness testifies.

“A Court may reject positive testimony, although it be not contradicted or impeached by any direct testimony. Its inherent improbability may be such as to deny it all claim to belief. A witness’ manner of testifying may give rise to doubts as to his sincerity, or create the impression that the facts testified to by him are colored or not correctly stated,” and cases cited.

The jury in this case had a right to determine from the evidence the amount of credence to be given to the testimony of Count Armand d’Aleria and Countess Kate I. d’Aleria. When the case was tried, and long prior thereto, they had intermarried and were then husband and wife. That at the time of the accident that they were sweethearts; that Adrian, as he was then known, was a poor musician and working for wages when so employed, plaintiff in error, the widow of Senator George Nixon, deceased, commonly called Mrs. George Nixon, wealthy and socially prominent. They being husband and wife at the time of the trial, the jury had a right to consider their relation at that time, their interest in the case, and in the outcome of the case, and the reasonableness or unreasonableness of their statements and their evidence as given in the case, and the amount of credence to be given to their testimony; the jury had a right to reject it, or to accept part of it or reject part of it, its weight and effect was for the jury. The plaintiff in error moved for

a new trial, which was denied by the trial court (Page 30, Transcript).

On Motion for a new trial it was held in *Smith Booth Usher Co. vs. Detroit Mining Company*, 220 Fed. 601, that

“If a verdict is rendered contrary to the evidence, the remedy for the losing party is a motion for a new trial. In disposing of that motion, the Court, in the exercise of a sound legal discretion, may interpose and prevent the injustice that may be done by such a verdict.” *Insurance Company vs. Doster*, 106 U. S. 30-32. “The court may be of opinion that, according to the weight of the testimony, a verdict should be returned for the party asking a peremptory instruction. But it may not, for that reason alone, give such an instruction. It may not take the case from the jury, on issues of fact, unless the evidence is so distinctly all one way that a different view of it would shock the judicial mind.” (Page 603.) “The right to a jury trial is guaranteed by the constitution, and it is not to be denied except in a clear case. The foregoing decisions, and many others might be cited, have definitely and distinctly established the rule that if there is any substantial evidence bearing upon the issues, to which the jury may give credit the court is not authorized to instruct the jury to find a verdict in opposition thereto.” *Carolina C. Ry Co. vs. Strup*, 239 Fed. 79.

In this case the trial court heard and saw the witnesses, and in determining the motion for a new trial weighed the evidence in the case and denied the motion.

The trial court could not weigh the evidence in determining the motion for a directed verdict.

Berger vs. Payne, 274 Fed. 787.

Payne vs. Haubert, 277 Fed. 648.

Atlantic Ice & Coal Co. vs. Van, 276 Fed. 647.

Leahy vs. Detroit M. & T. Short Line Ry., 240 Fed. 86.

Murray vs. United R. R. of S. F., Vol. 33, Cal. App. Dec. 282.

The court on motion for a directed verdict must take the view most favorable to the party not moving

The weight and effect of the evidence is for the jury to determine in arriving at its verdict, and again on motion for a new trial it is for the trial court to weigh the evidence and to determine its weight and effect.

It is held in *Payne vs. Haubert*, 277 Fed. 649, that

“This court has no authority to review and reverse this judgment upon the weight of the evidence.” . . . “No exceptions were taken to the charge of the court upon this issue, . . . this assignment of error must be overruled.”

It should be noticed that in this case no exception was taken by the plaintiff in error in this case to the charge of the court upon this issue, that is the weight and sufficiency of the evidence, and therefore

this assignment of error as to the sufficiency of the evidence to sustain the verdict and judgment should be overruled when no exception to it was taken by the plaintiff in error in the trial court. There was but one exception taken by the plaintiff in error in the trial court, and that exception as hereinbefore stated was the refusal of the trial court to give to the jury an instruction for a directed verdict. This we contend is the only assignment of error upon which the plaintiff in error can be heard in this case upon her writ of error in this court. It should be noticed that all of the evidence before the jury in this case is not before this court in the Transcript of the Record filed herein.

We respectfully submit to this Honorable Court that the trial judge, Hon. Frank H. Rudkin, did not err in refusing to instruct the jury for a directed verdict in favor of plaintiff in error, and that the verdict and judgment should be affirmed.

W. C. CAVITT,
Attorney for Defendant in Error.

Dated, San Francisco, October 20, 1922.

No. 3895

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KATE I. D'ALERIA,

Plaintiff in Error,

VS.

CHARLES SHIREY and JENNIE SHIREY

(his wife),

Defendants in Error.

**PETITION OF PLAINTIFF IN ERROR FOR A REHEARING
BY THE UNITED STATES CIRCUIT COURT OF
APPEALS, NINTH CIRCUIT,**

**After Decision by Said Court on Writ of Error From the District
Court of the United States for the Northern
District of California.**

MILLER, THORNTON & MILLER,
W. I. GILBERT,

Royal Insurance Building, San Francisco.

*Attorneys for Plaintiff in Error
and Petitioner.*

FILED

MAR 3 - 1923

F. D. HUNTER

No. 3895

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

KATE I. D'ALERIA,

Plaintiff in Error,

VS.

CHARLES SHIREY and JENNIE SHIREY

(his wife),

Defendants in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING BY THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT,

After Decision by Said Court on Writ of Error From the District
Court of the United States for the Northern
District of California.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

The plaintiff in error in the above entitled cause hereby petitions this Court for a rehearing of said cause after decision rendered by said Court on writ of error from the District Court of the United States

for the Northern District of California, on the following grounds, to-wit:

1. That said decision, as appears from the Transcript of Record on file herein, is based upon an erroneous view by the Court as to what are the facts;

2. That the law in said decision applied to what is therein stated as facts, is in absolute and direct conflict with the law as laid down by the Supreme Court, and by the District Court of Appeal, in the State of California, in which said State said cause of action arose;

3. That said opinion, if permitted to stand, will result in great injustice to the plaintiff in error, as it will make her liable for acts of her employee for which, under the law of the State of California, she is not liable;

and in support of said petition said plaintiff in error respectfully represents and shows to this Honorable Court as follows:

FIRST: AS TO THE FACTS IN THE CASE.

The only testimony introduced at the trial of this action, which in any way whatever shows, or tends to show, the relationship between this plaintiff in error and Armand d'Aleria, one of the defendants in the above entitled cause, or to in any way connect her with the accident and injuries complained of by the defendants in error, is that of the plaintiff in error herself, that of the said Armand d'Aleria and that of one Genevieve Johnson, is as follows:

Testimony of Plaintiff in Error on Her Own Behalf.**Direct Examination.**

I am the person sued in this case as Kate Nixon. Since the commencement of this action I and Mr. d'Aleria, who is the same person sued herein as Harold A. Adrian, were married. We are not living together now as man and wife, and a suit is pending against him by me for divorce. I was the owner of the Locomobile touring car which collided with plaintiff's Studebaker, but at the time of that accident I was not in the car, and it was not being used by anyone under my instructions or authority.

Mr. MILLER: Q. Harold Adrian was driving the car at the time of the accident, was he not?

Mr. CAVITT: I object to that on the ground that it is immaterial, irrelevant and incompetent, and calls for a conclusion of this witness.

The COURT: You have proved it, why should you object to it?

Mr. CAVITT: I have proved it.

Mr. MILLER: All right. I will take your proof then.

Witness (continuing): Shortly prior to this accident I had asked Harold Adrian to take this Locomobile automobile from the Powell Street entrance of the St. Francis Hotel, which hotel is located on Powell Street between Post and Geary, to the Class A Garage at 737 or 735 Post Street. Adrian was not my chauffeur. We had been out to call on some friends on Palm Avenue, and immediately prior to my giving to him the instructions above we drove back to the St. Francis Hotel, getting there about eleven or a quarter past. When I got out of the car I requested Adrian to take it up to the garage right away and leave it there. Adrian was a musician,—an organist.

Cross-Examination.

I was living at Reno, but at the time of this accident was living at the St. Francis Hotel, and Mr. d'Aleria was also living there. I think I had been there about a week. Mr. Adrian drove the car that night and once or twice before. I think he drove the car once or twice while we were in Reno. He did not drive it from Reno to Los Angeles or from Los Angeles to San Francisco. He had only driven the car once or twice before the accident. He got the car from the garage with my permission two or three times. I do not know exactly. When the car was first taken to the Class A Garage I think the boy who was driving for me took it there. His name, I believe, was Clarence. He had been driving the car two or three months, I think. Mr. Adrian was in my employ in Reno as a musician. He may have driven the car once or twice in Reno. I do not say definitely he drove the car only four times. I say only a few times. I do not think more than half a dozen times. I do not believe more than half a dozen times altogether during the three months he was in my employ as a musician. He did not drive the car after the accident. About the first time he drove my car in Reno I think was the latter part of March or the fore part of April. The night of the accident Mr. Adrian and myself had been out to Arthur Reese's on Palm Avenue in the Richmond District, and got back to the St. Francis about eleven or half past eleven. The car had been kept by me at the Class A Garage a week or two, something like that, I do not remember exactly. I had been in San Francisco about two weeks. That is the only garage in which the car was kept.

Redirect Examination.

Mr. Reese was a music publisher here in San Francisco, and had a place down on Market

Street which I do not think was kept open at night.

Pages 38 to 42, inclusive, of Transcript of Record.

Testimony of Harold A. Adrian on Behalf of Plaintiff in Error.

Direct Examination.

My name is Harold A. Adrian, age 22, living at 5226½ Sunset Boulevard, and am a musician. I am one of the defendants in this case, and know my co-defendant sued herein as Kate Nixon and Mrs. George Nixon. On the 19th and 20th days of April, 1919, I was living at the St. Francis Hotel in San Francisco, which was on the west side of Powell Street between Geary and Post Streets. Mrs. Nixon was living at the St. Francis Hotel on those dates. About 12:30 A. M. on Sunday, April 20th, 1919, I was driving and was in charge of a Locomobile owned by Mrs. Nixon at or near the intersection of Golden Gate Avenue and Gough Street in the City and County of San Francisco, State of California. The defendant Mrs. Nixon was not at that time with me in that automobile. She had been with me in that automobile that evening when I was driving and operating same and she left the automobile about twenty minutes before the accident, which occurred at the intersection of Golden Gate Avenue and Gough Street. I dropped her at the St. Francis Hotel. This automobile was kept at the Post Street Garage sometimes, and at other places. I do not know the exact location of that garage. I was instructed to take the car to the garage, but first told her I was going down to Market Street to see a music publisher down there by the name of Reese, and then I was going to take the car to the garage. I did not go directly to the garage, but did so after I had finished my business. I went to Market Street to the Pantages The-

atre Building, and then to Turk Street on the way to Golden Gate Avenue for a detour, a little ride. There I picked up Harry Hume, who wanted me to drive him to the Fairmont, and I was going to take him there when the accident happened. About the hour of 12:30 A. M. on Sunday, April 20th, 1919, a collision occurred on the intersection of Golden Gate Avenue with Gough Street, between said Locomobile and a Studebaker automobile being driven or operated by the plaintiff Charles Shirey. At the time of such collision, I was driving said Locomobile automobile. There was with me in it Harry Hume and another party unknown to me by name. I was driving the automobile for the purpose of seeing a Mr. Reese, at the Pantages Theatre, about the formation of a music publishing company, which business was my individual business. I never at any time was in the employ of Mrs. Nixon as her chauffeur, but was in her employ as a concert organist.

Pages 47 to 51, inclusive, of Transcript of Record.

Testimony of Genevieve Johnson on Behalf of Defendants in Error.

Direct Examination.

In the month of April, 1919, I was employed in the Class A Garage as a bookkeeper, and in charge of the office, and had been there since February. I knew Harold A. Adrian. He brought a car into the garage, but I do not remember the date. He brought the car into the garage and took the car out of the garage—came after it several times again and took it out.

Pages 51, 52 and 53 of Transcript of Record.

Cross-Examination.

I do not remember the dates because I have not looked them up. (Page 53 of Transcript.) I

know he came there at least three or four times. (Page 54 of Transcript.) He brought the car in the garage and came to me in the office and told me to send the bills to Mrs. Nixon at the St. Francis Hotel as usual. (Page 55 of Transcript.) Mrs. Nixon had always had a driver before, and it had been some boy we knew, and this boy we did not know until he came after the car. She had always had a driver before since about 1914. She did not keep the car steadily but kept it there off and on whenever she was in San Francisco. (Page 55 of Transcript.)

The foregoing are facts established by evidence introduced on the trial of this case as to which there is absolutely no conflict of any kind or character; and we respectfully submit that they conclusively show that at the time of the accident in question plaintiff in error was not in the automobile belonging to her, and had no management or control thereover; that it was not being used or operated for her or in connection with any of her business or affairs; that at the time of said accident said automobile was in the sole and exclusive possession, management and control of the said d'Aleria, and was being used and operated by him solely and only for his own personal purposes.

We also further respectfully submit that the foregoing testimony conclusively shows that at the time of the accident in question d'Aleria was not returning the automobile of the plaintiff in error to the garage where he had been directed by her to take it, for the accident occurred, as it will be noted from

that testimony, at Golden Gate Avenue and Gough Street, while the garage in question was at 735 and 737 Post Street, between Jones and Leavenworth Streets. From this it will be seen that the accident in question occurred some six blocks south of Post Street and about seven blocks west of said garage. We respectfully suggest, therefore, that the Court was in error when it stated in its opinion, which is set forth in full in the appendix following this petition, as follows:

“The evidence sufficiently shows that d’Aleria, although not engaged as a chauffeur by the plaintiff in error, sustained such relation to her that in returning the automobile to the garage he acted as her servant.”

It will also be noted that there is no contradiction of any kind or character of the testimony of d’Aleria to the effect that at the time of the accident in question he was using the automobile of plaintiff in error for the purpose of taking a ride with a friend of his by the name of Hume, and was then on his way to the Fairmont Hotel where Mr. Hume resided. It will also be noted by the testimony of d’Aleria, which is in no way disputed, that after he left the St. Francis Hotel with the automobile of plaintiff in error he was using said automobile solely and only for his own personal purposes and not for or in connection with any business or affairs of said plaintiff in error.

That testimony, we respectfully submit, is absolutely uncontradicted, is clear and concise, and was

in no way whatever discredited; and it will be noted on an examination of the Transcript that the plaintiff in this case did not make any attempt of any kind or character to discredit it or to impeach Mr. d'Aleria.

Under such circumstances we respectfully submit that the jury was without any justification whatever in disregarding Mr. d'Aleria's testimony; that their right to accept or reject the testimony of a witness is not an arbitrary one, but one that must be justified by something brought before them in the trial of the case.

Also the same remarks are applicable to the testimony of this plaintiff in error. She was not impeached. No attempt of any kind or character was made to impeach her, or to in any way discredit her testimony, and she stated positively that at the time of this accident her automobile was not being used for her, or for or in connection with any of her business affairs.

The Court in its opinion also states with reference to d'Aleria as follows:

“He had, as the evidence clearly shows, acted as her agent in going to the garage to get the automobile for her, in driving it for her, and in returning it to the garage after she had used it.”

But if your Honors will examine the testimony to which we have hereinbefore referred, it will be seen that this statement is correct only to a limited extent; that d'Aleria was not the chauffeur of plaintiff in error, and that he had not driven her car except

on a few occasions, not more than half a dozen times altogether; that plaintiff in error had had a chauffeur who had driven her car and looked after it up to the two weeks she was in San Francisco in April, 1919.

The Court further states in its opinion with reference to d'Aleria:

“He had no means with which to respond in damages, and it is obvious that both he and she had every incentive to relieve her from responsibility from the results of the accident.”

Here again, we believe the Court is in error, and that the evidence above quoted does not justify that conclusion; and in support of this view we would respectfully call the attention of the Court to the fact that according to the evidence to which we have hereinbefore referred, plaintiff in error and d'Aleria were not living together as husband and wife; that plaintiff in error had sued him for a divorce, which divorce was then pending. Under such circumstances, it would seem that there would be greater justification for believing that d'Aleria would try to injure plaintiff in error rather than to help her.

And we might also add in this regard, that even though it be a fact that d'Aleria is personally irresponsible financially, that cannot constitute any good reason for shifting any legal liability that exists against him arising out of this accident to the shoulders of the plaintiff in error.

The Court further states in its opinion when referring to the *prima facie* presumption of liability against the plaintiff in error because of her ownership of the automobile in question, as follows:

“The jury was not bound to believe all the testimony that was offered on behalf of plaintiff in error to overcome that presumption.”

With relation to this, we would respectfully suggest that inasmuch as the only testimony in this regard was that of plaintiff in error and that of d'Aleria; that their testimony is without any conflict whatever and is in no way whatever discredited, and they were not impeached or attempted to be impeached by the plaintiff in this action, the jury was not justified in arbitrarily rejecting it.

The Court also further states in its opinion as follows:

“As to the instructions under which the automobile was placed in charge of the driver, the testimony of the two parties who alone knew the facts differs.”

Here again, we respectfully suggest that the Court is in error. The plaintiff in error says she told d'Aleria to take the car to the garage. This is not disputed by d'Aleria. He admits that she so told him, but he stated to her that he would first go down to see a man named Reese on Market Street.

The Court again states in its opinion:

“What was done with the automobile during the ensuing twenty minutes, the driver alone

knew. The jury were not bound to believe that he picked up a friend en route or that if he did he intended to go elsewhere than to the garage. There was no corroboration of the driver's testimony by the person who he said was with him at the time of the accident, and there was nothing in the record to corroborate the driver's evidence that such a person was with him at that time. The jury may have believed that the errand of d'Aleria to the music store on Market Street was an errand on behalf of the plaintiff in error. She did not testify that it was not."

With relation to this, we would respectfully suggest that inasmuch as the testimony of d'Aleria as to his actions after he left the St. Francis Hotel is without any conflict whatever, and is in no way discredited; and inasmuch as no attempt of any kind or character was made to impeach that testimony, it would hardly seem that there was any justification for the jury to disbelieve or reject it. While it is true there is no corroboration of the driver's statement, it is also true that it stands as the only evidence of what he did.

And as to the suggestion that the jury may have believed d'Aleria went to the music store on Market Street for the plaintiff in error, we would respectfully suggest that if they did so believe, their belief was absolutely without any justification of any kind or character, for plaintiff in error testified that her only conversation with d'Aleria when he left the hotel was that she told him to take the automobile to the garage, while his testimony is that he went to Market Street to the Pantages Theatre Building to

see Mr. Reese, a music publisher, on his own individual business.

Under such circumstances, we would respectfully submit that while the plaintiff in error did not in so many words state that d'Aleria did not visit Mr. Reese on her business, what she did state was in such direct conflict with that idea that her testimony is equivalent to an absolute statement that he did not go to visit Mr. Reese on her business.

SECOND: AS TO THE LAW OF THE CASE.

While it is true, as stated in the opinion of the Court, that:

“*Prima facie* the plaintiff in error was liable for the negligent act of d'Aleria, for the collision occurred from the negligent driving of an automobile belonging to the plaintiff in error and driven by her servant”,

it is equally true that that presumption has not, and should not have any weight whatever against the positive uncontradicted testimony of the plaintiff in error and that of d'Aleria (neither of whom was impeached or attempted to be impeached) that at the time of the accident complained of d'Aleria was not in fact acting for the plaintiff in error or for or in connection with any of her business or affairs, but was acting solely and only for his own personal purposes. That in this view of the matter we are correct, we submit is conclusively established by the following cases decided by the District Court of

Appeal of this State, the principles of law stated in which have in no way been modified or changed, and constitute the law of the State of California, to-wit:

Brown v. Chevrolet, 39 Cal. App. 738:

This was an action for damages for personal injuries alleged to have been caused by the negligence of one West in driving an automobile belonging to the Chevrolet Motor Company. Plaintiff called the president of the company as a witness on the trial of the case and proved by him that the automobile in question was the property of the company and was being used by West with the company's permission but not on any business or affairs of said company. The court in passing upon this case used the following language:

“Under the recent case of *McWhirter v. Fuller*, 35 Cal. App. 288 (170 Pac. 417), and many authorities in other jurisdictions, proof of ownership of the automobile, and its use at the time of the accident, under the permission of such owner, established a prima facie case of responsibility for the resulting injuries as against such owner. Appellant insists that, having established a prima facie case, any evidence in conflict therewith was a part of the defense; and that it was the province of the jury to weigh such conflicting evidence and to determine therefrom the ultimate liability of the defendant. The evident answer to this contention is, that the fact which plaintiff sought to prove by the manager of the defendant company was the agency of the driver of the automobile at the time of the accident. Having elicited on direct examination information sufficient to establish a prima facie case of such agency, plaintiff could not properly object to further evidence on the same subject on cross-examination, which would overcome the presumption arising from the

proof of the prima facie case. Any facts as to the nature of the agency were proper subjects of inquiry upon cross-examination, or by the court during the direct examination.

In a somewhat similar case, the court of appeals of New York has recently said: "The presumption growing out of a prima facie case, however, remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely upon it. (*Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435, (Ann. Cas. 1918B, 540, 113 N. E. 507.)) Here the presumption arising from the fact of ownership was entirely destroyed by the other evidence. (*Potts v. Pardee*, 220 N. Y. 431, (116 N. E. 78).)

Maupin v. Solomon, et al., 41 Cal. App. 323:

This was an action to recover damages for the destruction of an automobile belonging to the plaintiff as the result of a collision alleged to have been caused by the negligence of the defendants. At the time of the collision, the defendant Solomon was in the employ of the defendant M. A. Gunst Company, and to facilitate the discharge of his duties was furnished by his employer with an automobile for use in the course of such employment. For his personal recreation he took two friends for a ride, and while so using the automobile in question the accident complained of happened. It was not denied that at the time of the accident, the automobile in question was being used by Solomon for his own personal purposes, or that the accident was the result of his negligence, but it was contended by the plaintiff that when he proved that the automobile belonged to the appellant, and was being operated by its employe at the time of the collision, a presumption arose that

the employe was acting within the scope of his employment, and that such presumption remained in the case in spite of clear and positive uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, and that as a result the action of the trial court in denying a new trial must stand on appeal. The court in passing on this question used the following language:

“It is not denied, as testified to by the witnesses introduced by appellant, and corroborated by the surrounding circumstances, that at the time of the accident Solomon was engaged in a pursuit wholly his own, and that such use of the automobile was without the consent of and against the instructions of the appellant. Nor is it disputed that the accident was the result of the negligence of Solomon. But plaintiff’s contention in support of the judgment is that when he proved that the automobile belonged to the appellant and was being operated by its employee at the time of the collision, a presumption arose that the employee was acting within the scope of his employment, and that such presumption remained in the case in spite of the clear, positive, and uncontradicted evidence that Solomon was not so acting, and created a substantial conflict in the evidence, with the result that the action of the court in denying a motion for a new trial must be sustained upon appeal.

With this position we cannot agree. The inference relied upon by respondent cannot be indulged under the circumstances of this case. It must yield to the direct and unequivocal evidence rebutting such inference. “Presumptions”, such as the one relied on here, “are allowed to stand not against the facts they represent but in lieu of proof of facts, and when the fact is proven contrary to the presumption, no conflict arises, but the presumption is simply

overcome and dispelled.” (Savings & Loan Soc. v. Burnett, 106 Cal. 514, (39 Pac. 922).) The authorities in this state abundantly support this view. (Freese v. Hibernia etc. Soc., 139 Cal. 392, (73 Pac. 172); King v. Hercules Powder Co., 39 Cal. App. 223, (178 Pac. 531); Mullia v. Ye Planary Building Co., 32 Cal. App. 6. (161 Pac. 1008); Mauchle v. Panama Int. Exp. Co., 37 Cal. App. 715, (174 Pac. 400).)

The very recent case of *Brown v. Chevrolet Motor Co. of California*, 39 Cal. App. 738, (179 Pac. 697), in an essential respect is like this case. There a traveling salesman employed by the defendant borrowed its automobile for a pleasure excursion, and while so using it injured the plaintiff. There, as here, the plaintiff contended that he had made out a prima facie case when he had shown that the automobile belonged to the defendant, and that it was the province of the jury to weigh any evidence in conflict therewith; but the court held that a nonsuit had been properly granted, and, quoting from the case of *Matter of Carroll v. Knickerbocker Ice Co.*, 218 N. Y. 435 (Ann. Cas. 1918B, 540, 113 N. E. 507), said: “The presumption growing out of a prima facie case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and, unless met by further proof, there is nothing to justify a finding based solely on it.”

Martinelli v. Bond, et al., 42 Cal. App. 210:

This was an action for damages for personal injuries alleged to have been caused by the negligence of the defendants. The proofs were uncontradicted that at the time of the accident the automobile of the defendant Bond was being operated and used by the defendant Noonan for his own personal purposes. That said automobile

had been furnished to Noonan by Bond, Noonan being employed as the manager of Bond's business, and keeping the automobile on his own premises. Here it was contended that when it was proved that the automobile in question belonged to Bond, and was being used by his employee, a presumption arose against Bond, and that when testimony was introduced on behalf of Bond that at the time of the accident Noonan was using the automobile for his own personal purposes such a conflict arose as would preclude the Appellate Court from interfering with the judgment rendered. In passing upon this question the Court used the following language:

“(1) The test of an owner's liability for the tortious act of his employee, while driving the former's automobile, is the nature of its use at the time of the accident; whether or not it is then being used in the transaction of the owner's business. The very basis of the rule of respondeat superior, as applied to automobile accidents, is that the driver of the machine is acting for the owner and not for himself personally at the time of the accident. As soon as the driver steps aside from the owner's business and enters upon the performance of some independent purpose of his own, he ceases to act as the agent of the owner, and the latter's responsibility for his acts terminates. (2) Appellant cites a large number of cases in which owners of automobiles have been relieved from liability for damages resulting from accidents, by reason of the fact that, at the time of such accident, the automobile was in use for a pleasure ride or other personal purpose of the driver. This rule is so well established that there can hardly be said to be conflict of authority thereon. The citation of the following authorities is sufficient to indicate the basis of the rule and its wide application; Thompson on Negligence,

sec. 526; Berry on Automobiles, 2d ed., secs. 601, 618; Babbitt on the Law Applied to Motor Vehicles, 2d ed., secs. 872, 891; Davids on the Law of Motor Vehicles, sec. 216; Mullia v. Ye Planary Bldg. Co., 32 Cal. App. 6, (161 Pac. 1008); Mauchle v. Panama-Pacific etc. Exp. Co., 37 Cal. App. 715, (174 Pac. 400); Brown v. Chevrolet Motor Co. of Cal., 39 Cal. App. 739, (179 Pac. 697); Maupin v. Solomon, 41 Cal. App. 323, (183 Pac. 198); Power v. Arnold Engineering Co., 142 App. Div. 401, (126 N. Y. Supp. 839); Cunningham v. Castle, 127 App. Div. 580, (111 N. Y. Supp. 1057); Morier v. St. Paul etc. Ry. Co., 31 Minn. 351, (47 Am. Rep. 793, 17 N. W. 952); Gousse v. Lowe, 41 App. 715, (183 Pac. 295.).

(3) Upon principle and authority, neither the ownership of the automobile by appellant, nor the fact that the use and care of the same were intrusted by appellant entirely to the defendant Noonan renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with the appellant or his business.

(4) Respondent relies upon cases which hold that when an employee is entrusted with an automobile, with permission to use it at his discretion in the business of the employer, under what has been termed a "roving commission," it is not necessary, in order to establish the owner's liability to prove that, at the time the injuries were received, the employee was engaged in performing any particular business of the principal. The authorities so relied upon recognize that, even under that rule, it is still necessary to show that, at the time of the commission of the tort, the employee was acting within the general scope of his employment. (Jessen v. Peterson, Nelson & Co., 18 Cal. App. 349, 354 (123 Pac. 219); Berry on Automobiles, 2d Ed., sec. 626.)

(5) It is further contended by respondent that he made a prima facie case against appellant by proof of the latter's ownership of the automobile, and the fact that the driver, Noonan was his employee at the time of the accident. The presumption arising from such prima facie case remained only so long as there was no substantial evidence to the contrary. When the fact is proven to the contrary without contradiction, no conflict of evidence arises, but the presumption is simply overcome. (*Maupin v. Solomon*, supra; *Brown v. Chevrolet Motor Co. of Cal.*, supra.) In this case there is no conflict in the evidence as to the fact that at the time of the accident, the automobile was in use by the employee for his personal pleasure. Uncontradicted proof of that fact dispelled the presumption of liability on the part of the owner.

The judgment against the appellant Bond is reversed.

Langdon, P. J., and Brittain, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the Supreme Court on September 11, 1919. (*See Maupin v. Solomon*, 41 Cal. App. 323, (183 Pac. 198).)

All the Justices concurred.

The Court in its opinion also states that

"If a servant while about his master's business, makes a deviation of a few blocks for ends of his own, the master is nevertheless liable."

With relation to this we would respectfully call the attention of the Court, in the first place, to the fact that the deviation was not one of only a few blocks but one of some twelve or thirteen blocks, as we have hereinbefore shown; and in the second place

that the law as there stated is in direct conflict with the law as declared in the following cases:

Patterson v. Kates, 152 Fed. 481;
 Gousse v. Lowe, 41 Cal. App. 715;
 Martinelli v. Bond, 42 Cal. App. 209.

In *Patterson v. Kates*, 152 Fed. 481, the Court held there was no liability on the part of the owner of an automobile under the following circumstances: The defendant owned an automobile which broke down on the way from Atlantic City to Philadelphia, and which he then left with his driver with instructions to repair it and bring it to Philadelphia. After the driver had reached the Delaware River, and while waiting for a ferry, he consented to take a third person in the machine to a place about a mile back on the road, and while making such trip, through his negligence in running too fast, he came into a collision with a horse and wagon on the highway, by which plaintiffs were injured.

Gousse v. Lowe, 41 Cal. App. 715:

Here the Court held, as shown by the syllabus in the case, where the automobile of the owner was being driven by the owner's employee on affairs of his own, as follows:

“If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and while so engaged commits a tort, the master is not answerable although he is using the mas-

ter's property, and although the injury could not have been caused without the facilities offered to the servant by reason of his relations to his master."

Martinelli v. Bond, et al., 42 Cal. App. 209:

Here the Court held where the automobile of the owner was being driven by the owner's employee on affairs of his own, as follows:

"The test of the owner's liability for the tortious act of his employee while driving the former's automobile is the nature of its use at the time of the accident; whether or not it is then being used in the transaction of the owner's business. The very basis of the rule of respondeat superior as applied to automobile accidents is that the driver of a machine is acting for the owner and not for himself personally at the time of the accident. As soon as the driver steps aside from the owner's business and enters upon the performance of some independent purpose of his own, he ceases to act as agent of the owner and the latter's responsibility for his act terminates. * * * Upon principle and authority, neither the ownership of the automobile by appellant nor the fact that the use and care of the same were entrusted by appellant entirely to the defendant Noonan renders the appellant liable for injuries inflicted by the automobile while in use for a purpose entirely unconnected with appellant or his business."

While we are aware of the fact that this Court is not absolutely bound by the decisions of the District Court of Appeal of the State of California, we understand, at the same time, the rule to be that Federal Courts will follow decisions of State Courts made before the cause of action arose, in the absence

of constitutional difficulties. That in this view of the matter we are correct, we believe is conclusively established by the authorities referred to in Section 477B, Volume 3, Foster's Federal Practice.

For instance, in the case of *Snare, etc. v. Friedman*, 169 Federal 1, an action brought to recover damages for personal injuries, and taken to the United States Circuit Court of Appeals on a Writ of Error, the Court in discussing the effect that should be given by a Federal Court to the law of a State Court uses the following language:

"In any trial at common law, a Circuit Court of the United States where its jurisdiction is founded on diverse citizenship has to inquire what the law of the State in which its jurisdiction is exercised may be, and it is the law of that State, whether statute or common law, that it is called upon to administer."

(See third paragraph, page 11.)

And we might add that the law as stated in that case was quoted with approval by the Court in the case of *Tobey v. Scranton Railway Company*, 245 Fed. 365, where the following language is used, as shown by the syllabus in that case:

"In the absence of uniform recognized decisions by the State Court covering the rights and conduct of persons regarding the matter under consideration, the Federal Court may regard with equal respect the decisions of courts of other States."

In view of what is stated above, we respectfully submit that the plaintiff in this action is entitled to a rehearing of said cause; to a re-examination of the

facts involved therein and of the law applicable thereto for the reasons:

1. That with due deference to the learned Judge who signed the opinion rendered by this Court, we believe said opinion to have been given and made by him under a mistaken idea of the actual facts as they are shown by the Transcript of Record on file herein;

2. That the law as stated in said opinion is not only in conflict with the law as laid down by the Court in *Patterson v. Kates*, 152 Fed. 481, but also in conflict with the law as established by the District Court of Appeal of the State of California;

3. That said opinion, if permitted to stand, will result in great injustice to the plaintiff in error, as it will make her liable for acts of her employee for which, under the law of the State of California, she is not liable.

Dated, San Francisco,

March 5, 1923.

MILLER, THORNTON & MILLER,

W. I. GILBERT,

*Attorneys for Plaintiff in Error
and Petitioner.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause

and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
March 5, 1923.

H. B. M. MILLER,
*Of Counsel for Plaintiff in Error
and Petitioner.*

(APPENDIX FOLLOWS.)

Appendix.

Appendix

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. 3895

Kate I. d'Aleria,

Plaintiff in Error,

vs.

Charles Shirey and Jennie Shirey

(his wife),

Defendants in Error.

Before Gilbert and Hunt, Circuit Judges, and
Wolverton, District Judge.

Gilbert, Circuit Judge:

OPINION

The defendants in error obtained a judgment against the plaintiff in error for damages resulting from a collision between an automobile occupied by the former and an automobile belonging to the latter. The plaintiff in error in her automobile together with one, Armand d'Aleria, arrived at 11 o'clock at night at the hotel in San Francisco where they both resided. The plaintiff in error went into the hotel, leaving d'Aleria to take the automobile, which was a large Locomobile touring car, to the garage where it was usually kept. Twenty minutes later, the collision oc-

curred while the automobile was being driven by d'Aleria. The only testimony as to what occurred from the time when he left the hotel until the accident is furnished by him. Before giving his testimony he had married the plaintiff in error. He testified that the plaintiff in error told him to take the automobile to the garage and that he replied that he would first call at a certain music store to see a music publisher. He testified that he did make the call and that thereafter he picked up a friend whom he intended to take to the Fairmont Hotel, and that he was about to do so when the accident occurred. The Court below instructed the jury that if the automobile in possession of the driver was at the time of the accident operated by him for his own purposes and not in the transaction of any of the duties of his employment with the plaintiff in error, the latter could not be legally held responsible for damages, but that if the automobile were driven for the purposes of the owner, she would be liable for the driver's acts and negligence.

The only assignment of error is that the Court below denied the motion of the plaintiff in error for an instructed verdict in her favor. The plaintiff in error relies upon the doctrine that for a negligent act done by a servant, the master is not liable, unless the act was done at a time when the servant was engaged in his master's business. The evidence sufficiently shows that d'Aleria although not engaged as a chauffeur by the plaintiff in error, sustained such relation to her that in returning the

automobile to the garage, he acted as her servant. He had been employed by her as a musician. He had, as the evidence clearly indicates acted as her agent in going to the garage to get the automobile for her, in driving it for her, and in returning it to the garage after she had used it. He had no means with which to respond in damages and it is obvious that both he and she had every incentive to relieve her from responsibility for the results of the accident. *Prima facie*, the plaintiff in error was liable for the negligent act of d'Aleria, for the collision occurred from the negligent driving of an automobile belonging to the plaintiff in error and driven by her servant. The jury was not bound to believe all the testimony that was offered on behalf of the plaintiff in error to overcome that presumption. As to the instructions under which the automobile was placed in charge of the driver the testimony of the two parties who alone knew the facts, differed. What was done with the automobile, during the ensuing twenty minutes, the driver alone knew. The jury were not bound to believe that he picked up a friend en route or that if he did, he intended to go elsewhere than to the garage. There was no corroboration of the driver's testimony by the person who, he said, was with him at the time of the accident, and there is nothing in the record to corroborate the driver's evidence that such a person was with him at that time. The jury may have believed that the errand of d'Aleria to a music store on Market Street was an errand on behalf of the plaintiff in error. She did not testify that it

was not. If a servant, while about his master's business, makes a deviation of a few blocks for ends of his own, the master is nevertheless liable. *Ryne v. Liebers Farm Equipment Co.*, 186 N. W. 358; *Clawson v. Pierce-Arrow Motor Car Co.*, 231 N. Y. 273; *Donaghue v. Hayden*, 208 Pac. 1007; *Ritchie v. Waller*, 63 Conn. 155; *Fisick v. Lorber*, 159 N. Y. S. 722; *Gibson v. Dupree*, 144 Pac. 1133; *White v. Mitchell Lewis Co.*, 244 Pa. 172; *Guthrie v. Holmes*, 272 Mo. 215.

The judgment is affirmed.

(Endorsed): Opinion. Filed February 5, 1923, F. D. Monckton, Clerk, By Paul P. O'Brien, Deputy Clerk. ⁵¹
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